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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JOHN LANE,

Petitioner,

v.

ARKANSAS VALLEY PUBLISHING CO., MERLE BARANCZYK AND ED QUILLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

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QUESTIONS PRESENTED

1. Whether the court below erred in affirming, under the First Amendment, the trial court's *sua sponte* dismissal of petitioner's libel action, without notice or hearing, on the basis of the trial court's independent determination of the issues of truth and "actual malice."

2. Whether the courts below erred in holding that to survive a Motion For Summary Judgment in a libel case, the First Amendment required petitioner to prove, by clear and convincing evidence, a prima facie case that the respondent newspaper published defamatory falsehoods with "actual malice."

3. Does the *Restatement (Second) of Torts*, §§ 565-566, articulate the parameters of the First Amendment "opinion privilege" based upon *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974), and did the courts below properly apply the principles of the privilege (a) in ruling that the earlier publication of news articles relating to incidents later the subject of defamatory imputations effects a privilege, (b) in holding that imputations of defamatory facts during a recall election campaign are privileged, and (c) in deciding that publication of defamatory fiction could not reasonably be perceived as literal, even in the absence of express or unavoidable identification of the publications as fiction and the presence of affidavits of readers who read the articles as fact.

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No. ____

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v.

ARKANSAS VALLEY PUBLISHING CO., MERLE BARANCZYK AND ED QUILLEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

JURISDICTION

The judgment of the Court of Appeals, State of Colorado, was entered on May 5, 1983, affirming the trial court's granting of Respondents' motion for summary judgment on September 25, 1981. The Court of Appeals denied a timely motion for rehearing on June 2, 1983. On December 19, 1983, the Supreme Court of Colorado denied a petition for certiorari, with one judge dissenting. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, John Lane, seeks recovery of damages resulting from eleven separate defamatory publications which appeared in *The Mountain Mail*, a newspaper

published by Respondents Baranczyk and the Arkansas Valley Publishing Company in Salida, Colorado. (*Publications*, appendix D, pp. 27a-57a). Salida and Chaffee County are located in the Rocky Mountains of Colorado and are part of a "closed media" community where *The Mountain Mail* is the primary source of local news and has a significant influence in the setting of the local discussion agendas. (*Dr. Ardyth Sohn affidavit*, appendix E, pp. 58a-61a). The publications appeared during 1979 and 1980, when Petitioner was a Chaffee County Commissioner. They charged Mr. Lane with acts of misfeasance and malfeasance in public office. They accused him of lying and violating state law for personal gain. They imputed absurd and venal behavior to him. They advocated and effected his recall from public office.

A large number of the articles contain admittedly fabricated material including a moronic letter identified as having been written by Lane and fictional conversations, in transcription format, between respondent Quillen and a nonexistent public relations officer reputedly hired by Lane at public expense to assist him in resisting recall efforts.

Petitioner filed this libel action in January, 1980. On April 28, 1981, Respondents filed a Motion for Summary Judgment requesting a partial adjudication pursuant to Colo.R.Civ.Proc. 56(d) determining "which of the words and statements of the subject publications constitute actionable statements of fact."

At the pretrial conference Respondents announced their intention to bring separate motions for summary judgment on the basis of truth and the lack of actual malice, if necessary, after the resolution of their first motion.

On July 13, 1981, the court held a hearing on Respondent's Motion to Determine which of the articles alleged defamatory facts and which articles were protected opinion under *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

At the hearing, the issues of truth and actual malice were specifically reserved for a later time by the parties and acknowledged as reserved by the court. (*Reservation of Issues*, appendix F, pp. 62a-63a).

On September 25, 1981, the court filed an opinion and order dismissing all of Petitioner's claims based upon Petitioner's failure to prove by clear and convincing evidence that the defamatory allegations were false and published with actual malice. (*Order granting motion for summary judgment*, appendix A, pp. 1a-9a).

The Colorado Court of Appeals, on May 5, 1983, affirmed the dismissal of the action, holding it proper for the trial court to address issues of truth and actual malice on the basis of pleadings, depositions on file, and affidavits, even without a specific motion, notice or hearing on the issue. (*Opinion*, appendix B, pp. 10a-19a). The Court declared it to be Petitioner's obligation to present a prima facie case with clear and convincing evidence of falsity and actual malice in defense of the motion for summary judgment. The Court affirmed the trial court's finding, as a matter of law, that prior publications, concerning matters which are later the subject of defamatory imputations, rendered the defamations privileged; that defamatory imputations of facts during political campaigns were privileged; and that defamatory statements by fictional characters in a newspaper could not reasonably be perceived as literal.

The court denied Petitioner's request for rehearing on June 9, 1983. The Colorado Supreme Court denied Peti-

tioner's request for Writ of Certiorari, with one justice dissenting, on December 19, 1983. (*Denial of Certiorari*, appendix C, pp. 20a-21a).

WHY CERTIORARI SHOULD BE GRANTED

I. THE FIRST AMENDMENT CANNOT SUPERSEDE THE FOURTEENTH AMENDMENT, THE CONSTITUTION OF THE STATE OF COLORADO AND THE COLORADO RULES OF CIVIL PROCEDURE BY PERMITTING *SUA SPONTE*, SUMMARY DISMISSAL BY THE TRIAL COURT OF PLAINTIFF'S LIBEL CLAIMS WITHOUT NOTICE OR HEARING.

Due process of law under the Fourteenth Amendment to the United States Constitution requires, at minimum, that deprivation of life, liberty or property be preceeded by notice and opportunity for hearing appropriate to the nature of the case. *Goss* v. *Lopez*, 419 U.S. 565, 42 L.Ed.2d 725, 95 S.Ct. 729 (1975). Article II, Section 6 of the Constitution of the State of Colorado grants to citizens the right to equality of justice in Colorado courts.

> "Section 6. *Equality of Justice.* Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay.

Colo.R.Civ. Proc. 56(c) regarding Summary Judgment, is identical to its federal counterpart providing for hearing on motions for summary judgment "at least ten days after the service thereof. . . ."

The spirit of the rule requires the same notice and hearing where the court contemplates summary dismissal on its own motion. *Herzog and Straus* v. *G.R.T. Corporation*, 553 F.2d 789 (2d Cir. 1977).

The issue before the court on summary judgment was solely the application of the opinion privilege inspired by

Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 41 L.Ed. 2d. 789, 94 S. Ct. 2997 (1974), to the publications in issue—a pure question of law. The respondents expressly limited the range of their motion in their brief.

> "By the instant Motion, Defendants seek a favorable determination of this litigation on the grounds that the statements complained of as libel are constitutionally privileged as opinion and political rhetoric. Alternatively, Defendant's request the Court to determine which of the subject words are privileged so that discovery, trial preparation and trial may proceed only with respect to those statements which are legally actionable." (Defendants' Brief in support of Motion for Summary Judgment).

All counsel and the court at the hearing, acknowledged the limited scope of the motion and hearing to the opinion issue. (*Reservation of Issues*, Appendix F, pp. 62a-63a). The court on September 25, 1981 issued an opinion which *sua sponte*, decided the motion primarily upon Petitioner's failure to prove falsity or reckless disregard. The Colorado Court of Appeals, in affirming the trial court's dismissal, ignored the impact on petitioner of having received no notice or hearing on the falsity and "actual malice" issues.

> "Lane was unable to show in response that the factual bases were false or that the defendants did not undertake a reasonable investigation before publishing the editorials. It was Lane's responsibility to present a genuine issue whether defendants published alleged defamatory falsehoods knowing them to be false, or with reckless disregard as to their truthfulness." (Appendix B, p. 18a)

There is no constitutional authority or rational justification for the Court of Appeal's denial to Petitioner of the benefits of elemental due process of law and equal access to justice, by permitting *sua sponte* dismissal of his

claim without notice and hearing under the guise of protecting the First Amendment.

The Court of Appeals has taken its obsessive preoccupation with media protection to an extreme which so distorts the meaning and import of the First Amendment that it virtually obliterates the balance of the bill of rights in defamation cases in Colorado. It violates the Fourteenth Amendment to the United States Constitution. It directly conflicts with the prior ruling of this Court, in *Herbert* v. *Lando*, 441 U.S. 153, 176, 99 S.Ct. 1635, 60L. Ed.2d. 115,134 (1979), that the First Amendment will not be construed to provide the press with complete immunity from liability from defamation. It effectively eliminates media defamation as a cause of action in Colorado.

II. THE STANDARD OF REVIEW IN LIBEL ACTIONS, AS IN ALL SUMMARY JUDGMENT CASES, IS WHETHER THE RECORD, CONSTRUED IN A LIGHT MOST FAVORABLE TO THE PARTY AGAINST WHOM THE JUDGMENT HAS BEEN ENTERED, DEMONSTRATES THAT THERE ARE GENUINE ISSUES OF FACT, WHICH IF PROVEN WOULD SUPPORT A JURY VERDICT FOR THAT PARTY.

The Colorado Court of Appeals, relying on *DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980), affirmed the trial court's ruling that there is "a more liberal application of summary judgment" justice to the media so that the First Amendment protections afforded them do not suffer a 'chilling effect'. (Appendix A, p.2a) *DiLeo*, *supra*, requires a plaintiff to prove, with convincing clarity, a prima facie case on summary judgment that the defendant published a defamatory falsehood with actual malice. This is, in effect, a presumption in favor of the grant of summary judgment for defendants in defamation actions. It requires a plaintiff to prove his case on paper, on

motion, without the benefit of the full panoply of circumstantial evidence and the factual inferences that would be available at trial.

Proof of "actual malice" requires proof of a state of mind, on the part of the publisher. *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L.Ed. 2d 686 (1964); *Herbert* v. *Lando, supra*. See 10A Wright, Miller, & Kane, *Federal Practice and Procedure*, § 2730, at 241-245. Proof of state of mind does not lend itself to summary disposition. *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9, 99 S.Ct. 2675, 2680 n.9, 61 L.Ed.2d 411, 442 n.9 (1979); *Lawrence* v. *Mass*, 639 F.2d 634, 639 (10th Cir. 1981); *Rebozo* v. *Washington Post Co.*, 637 F.2d 375, 381 (5th Cir. 1981). The standard of review in defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which if proven would support a jury verdict for that party. *Rebozo* v. *Washington Post Co.*, *supra*, 381; *Nader* v. *de Toledano*, 408 A.2d 31, 50 (D.C. 1979); *cert. denied*, 444 U.S. 1078, 200 S.Ct. 1028, 62 L.Ed.2d 761 (1980). See *Wolston* v. *Reader's Digest Association, Inc.*, 443 U.S. 157, 162 n.5, 99 S.Ct. 2701, 2705 n.5, 61 L.Ed.2d 450, 457 n.5 (1979).

The Colorado Court of Appeals not only deprived the Petitioner of an opportunity to present evidence on the issue of falsity and actual malice, but subjected Petitioner to an erroneous standard of review on summary judgment that, if upheld, effectively insulates all Colorado media respondents from all defamation liability in the absence of a signed confession of actual malice.

This Court, in *Hutchinson* v. *Proxmire*, *supra*, n.9., acknowledged the questionable propriety of "the rule" which Colorado and some other states apply in defama-

tion cases, which tips the scales in favor of granting summary judgment for media defendants. Despite the Court's warning, Colorado and other jurisdictions routinely dismiss defamation cases on the basis of an ambiguous standard of proof that can be changed at will to meet the arbitrary and personal predilections of the trial judge. The Court should provide a clear statement of the standard of review in summary judgment dismissals of defamation cases in order to eliminate the ambiguity in law and diversity of standards developing in all jurisdictions.

III. THE COURT OF APPEALS IMPROPERLY APPLIED THE OPINION PRIVILEGE TO THE CIRCUMSTANCES OF THIS CASE IN RULING THAT THE EARLIER PUBLICATION OF NEWS ARTICLES RELATING TO INCIDENTS, WHICH ARE LATER THE SUBJECT OF ALLEGATIONS OF DEFAMATORY FACT, IPSO FACTO, CREATES A PRIVILEGE; IN HOLDING THAT IMPUTATIONS OF DEFAMATORY FACT DURING A RECALL CAMPAIGN ARE ABSOLUTELY PRIVILEGED; AND IN DECIDING THAT DEFAMATORY PUBLICATIONS OF FICTION BY RESPONDENTS COULD NOT BE REASONABLY PERCEIVED AS LITERAL, EVEN IN THE ABSENCE OF EXPRESS OR OBVIOUS INDICATIONS OF FABRICATION AND THE PRESENCE OF THE AFFIDAVITS OF READERS WHO READ THE ARTICLES AS TRUTH.

In 1977, the American Law Institute, relying on Justice Powell's dicta in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), revised its *Restatement (Second) of Torts*, §§ 565-566 to expand the "fair comment" privilege to protect defamatory statements of opinion based upon facts known or mutually assumed by the parties to a communication. The *Restatement* formulation now provides that an actionable defamation may comprise (1) a statement of fact consist-

ing of an accusation of a particular act or omission that falls within the definition of a defamatory communication, *Id.*, § 565, or (2) a statement in the form of an opinion that implies the existence of undisclosed defamatory facts as the basis for the opinion, *id.* § 566.

The Respondents, in support of their motion for summary judgment, submitted numerous copies of newspaper articles, identified by affidavit and deposition references, on the theory that because there were prior publications in the Respondent's newspaper concerning the subject matter of the claimed defamations, the reader of the defamation had sufficient information to determine the truth, rendering the later publications mere expressions of opinion concerning mutually understood facts. An otherwise actionable defamatory imputation is privileged if the factual basis for the imputation is related in the communication or is mutually known to the parties to the communication. *Bucher* v. *Roberts*, 198 Colo. 1, 595 P.2d 239 (1979); *Rinaldi* v. *Holt, Rinehart and Winston, Inc.*, 42 N.Y. 2d 382, 397 N.Y.S. 2d 943 (1977); *Loeb* v. *Globe Newspaper*, 489 F.Supp. 481 (D. Mass. 1980); *Myers* v. *Boston Magazine Company*, 403 N.E. 2d 376 (Mass. 1980); *Restatement (Second) of Torts*, § 566.

The Respondents' submission of prior news articles failed to establish that the readers of the later defamations were aware of the actual facts because of the prior publications. The Respondents' submission primarily served to confuse the courts below as to the nature of the limited issues before the trial court at the time of the court's order.

> "Here, the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether

> defendants acted with reckless disregard of whether they were false or not." (*Opinion*, appendix B, p. 13a)
>
> * * *
>
> "Moreover, to the extent that the comments allude to a factual basis, because defendants demonstrated that these facts had been the subject of news articles and Lane submitted no evidence to the contrary, Lane did not sustain his burden of making a prima facie showing that defendants published defamatory falsehoods with reckless disregard to whether they were true or false." (*Opinion*, appendix B, p. 17a)

The newspaper's prior publication of facts, alone, cannot impute knowledge of those facts to its current readers so as to raise a privilege under the *Restatement, supra*, formulation of the opinion privilege.

Political hyperbole and outlandish rhetoric are reasonably expected in political affairs and campaigns and are generally given wide latitude as protected opinion if it is clear from the context that there is no imputation of undisclosed defamatory facts. *Greenbelt Cooperative Publishing Association* v. *Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed. 2d 6 (1970); *The Desert Sun Publishing Co.* v. *Superior Court*, 97 Cal. App. 3d 49, 158 Cal. Rptr. 519 (1979). The Colorado Court of Appeals, below, recognized a whole different *standard* in the application of opinion privilege in political contests. "This approach", the Court said, "expressly recognizes that comments made in the context of a hotly contested political campaign should not be judged by the same standards as those made in other contexts." (*Opinion*, appendix B, p. 15a) There is no First Amendment sanctioned "open season" upon politicians as seems to be suggested in the opinions below. Neither *Gertz* v. *Robert Welch, Inc.*,

supra, nor *Bucher* v. *Roberts*, *supra*, have eliminated all defamation actions based on allegations concerning matters of motive, integrity and political characterization. *Burns* v. *McGraw-Hill Broadcasting Co., Inc.*, ___ Colo. ___, 659 P.2d 1351 (1983). Neither the trial court nor the Court of Appeals engaged in anything close to the careful analysis of the defamatory publications required by the *Restatement* formulation or its subsequent judicial interpretations. They have created a new, absolute, First Amendment privilege not previously recognized or contemplated in *Gertz* v. *Robert Welch, Inc.*, *supra*, or the *Restatement*, *supra*.

Satire is "a topical literary composition holding up human or individual vices, folly, abuses or shortcomings to censure by means of ridicule, derision, burlesque, irony or other method, sometimes with an intent to bring about improvement." *Webster's Third International Dictionary*. Satire, like editorials or letters to the editor, can contain or imply false statements of fact. *Restatement (Second) of Torts*, § 563. If the false statements of defamatory fact in a satirical writing are fictional devices, they must be "conspicuously" and "unavoidably" identified as such within the four corners of the writing. *Myers* v. *Boston Magazine Co.*, *supra*, 381.

The meaning of a communication is that which the recipient correctly or mistakenly, but reasonably, perceives it to be. *Restatement (Second) of Torts*, § 563. *See Embry* v. *Holly*, ___ Md. App. ___, 429 A.2d 251 (1981). Where an alleged defamation could reasonably be determined to be either fact or opinion and the court cannot say as a matter of law that the statements were not understood as fact, there is a triable issue of fact for the jury. *Good Government of Seal Beach* v. *Superior Court*, 22 Cal. 3d 672, 150 Cal. Rptr. 258 (1978); *Marchiando* v. *Brown*, ___ N.M. ___, 649 P.2d 462 (1982).

Dr. Ardyth Sohn is an Assistant Professor of Journalism at the University of Colorado, who qualified in the trial court, on a prior motion, as an expert in the field of mass communications and the impact of media upon public opinion in small communities. Dr. Sohn, in an affidavit, presented in defense of Respondents' motion for summary judgment, testified that she had reviewed the Respondent's fictional articles concerning Petitioner and was unable to detect any of the generally accepted conspicuous and unavoidable indicators of fiction. (Appendix E, pp. 58a-61a). The courts below ignored Dr. Sohn's testimony and the affidavits of citizens who read the articles without perceiving them as fiction. (Affidavits, appendix G, pp. 64a-89a).

The courts below substituted their own opinions for the triers of fact in determining that the use of the name "Ananias Ziegler" in Respondent's publications was a clear tip off of the fiction of the Ananias Ziegler transcripts. Although, as the court below suggests, there is a biblical character named "Ananias" who was known for untruthfulness, the unassisted identification of the fictionalized composite of "Ananias," the liar, and former Nixon press secretary Ron Ziegler in 1980, would test even the most rabid Watergate enthusiast. There are four other Ananiases mentioned in the bible, (1) a Jewish high priest, before whom Paul was tried after his arrest in Jerusalem (Acts 23:2); (2) a Christian disciple of Paul living in Damascus (Acts: 9:10, 12-13, 17; 22-12); (3) a Christian of Jerusalem and husband of Sapphira (Acts 5:1, 3, 5); (4) the father of Azariah (Tob. 5:12). *The Interpreter's Dictionary of the Bible*, Abingdon Press, N.Y., 1962, p.124. There are even more Zieglers in Colorado. Even after the Respondents were made expressly aware that members of the pubic were perceiving the "Ziegler" articles literally, they continued to publish

them and to play upon rather than eliminate the ambiguity. (Appendix H, pp. 90a-91a). The Petitioner was entitled to, but never received, a careful legal analysis of each of the publications to determine the existence of implied or stated imputations of defamatory fact and the opportunity to have the triers of fact determine whether the fabricated "Supreme Commander" letter and the "Ziegler" transcripts could reasonably be perceived literally.

Since the opinion privilege sprang from the ear of *Gertz* v. *Robert Welch, Inc.*, *supra*, there has been no definitive articulation by this Court of the parameters of the opinion privilege. The uncontrolled conceptual expansion of the outer limits of the opinion privilege threatens to ratify what many publishers already take for granted: that for publications concerning public officials and public figures, the license to defame is absolute. The time is propitious for the guidance of the Court in this active and contentious area of constitutional development. Certiorari should be granted.

Respectfully submitted this 15th day of February, 1984.

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APPENDIX A

IN THE DISTRICT COURT
COUNTY OF FREMONT
STATE OF COLORADO

CASE NO. 81CV40

JOHN LANE,

Plaintiff,

vs.

ARKANSAS VALLEY PUBLISHING CO., a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Respondent.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

I. Background

Plaintiff was elected county commissioner in Chaffee County in November of 1978. Plaintiff stresses in his Affidavit that he received 64.3% of the vote at that election, which, he states, was the largest majority received by any candidate in a contested election that year.

Plaintiff further states that, at a subsequent recall election held some 14 months later, 62.8% of the votes were cast against him, which is a remarkable turnabout.

Plaintiff states further that the reason for this change was the conducting of a concerted effort by Defendants to cause his recall and defeat. The Court agrees that this is true, but success is not the test of the granting or denial of the Motion for Summary Judgment filed by Defendants but rather actual malice or a reckless disregard for the truth as measured by the "clear and convincing" or "convincing clarity" burden which the United States Supreme Court requires, and this is where Plaintiff and the Court part company.

Plaintiff further states in his pleadings and Affidavit that Defendants' concerted effort was to present a false and misleading image of his reputation and character to the general public. It is noteworthy to the Court that in his own Affidavit he fails to allege directly, or in the Court's opinion, even circumstantially, that Defendants acted with actual malice or with a reckless disregard for the truth. The sole and only existence of these essential elements, in this Court's opinion, are the bare allegations of the Complaint and Amended Complaint.

The Plaintiff is a public figure for purposes of this litigation, as to which all parties agree.

The Defendants, during the time in question, published in their newspaper, "The Mountain Mail", numerous items which castigate Plaintiff, sometimes as a matter of opinion and sometimes in a pernicious manner. Defendant Arkansas Valley Publishing Co., a Colorado corporation, owns the newspaper, Defendant Baranczyk is the managing editor, and Defendant Quillen is a reporter for the newspaper.

II. Questions of Law

1. *Elements of Plaintiff's Cause of Action.* As the Plaintiff *is* a public figure, the test for recovery is that set forth in *Sullivan* v. *N.Y. Times*, 376 U.S. 254, 111 L.Ed. 2d 686 (1965). Plaintiff, to be successful, must prove (1) that the statement was false and, in addition, (2) that the Defendants acted with actual malice or with reckless disregard for the truth.

2. *Plaintiff's Burden of Proof.* The *N.Y. Times* decision requires a clear and convincing showing by Plaintiff.

3. *Summary Judgment Requirements.* There are several decisions in this country which extend a more liberal application of summary judgment "justice" to the media so that the First Amendment protections afforded them do not suffer a "chilling effect".

In Colorado, we have *Di Leo* v. *Koltnow*, 613 P.2d 318 (Colo. 1980), where the granting of a motion for summary judgment was upheld. The Plaintiff there failed to present a prima facie case that the Defendants published the alleged defamatory falsehoods with actual malice or to make such a showing with convincing clarity. The Colorado Supreme Court here equated "convincing clarity" with "clear and convincing". As such, Plaintiff's evidence must be stronger than a preponderance and unmistakeable and free from serious or substantial doubt. See Colorado Jury Instructions 2d, Civil, 3:2.

This Court finds that Plaintiff has fallen far short of this burden.

Di Leo, supra, further holds that it is Plaintiff's responsibility to present *a genuine issue* as to whether Defendants published the alleged defamatory falsehoods knowing them to be false or with reckless disregard as to their truth or falsity. See Rule 56(e) CRCP. This is the usual test at the summary judgment stage. Although a reading of *Manuel* v. *Ft. Collins Newspapers, Inc.*, decided by the Colorado Supreme Court on July 27, 1981, might appear contrary to the *Di Leo* decision, I believe, in fact, that the cases are compatible. The *Manuel* decision should be limited to the appropriateness of appellate review *after* judgment of a prior denial of a motion for summary judgment.

This Court has reviewed the pleadings, affidavits, depositions, etc., i.e., the complete Court file.

III. Other Decisions Considered

1. *Gertz* v. *Welch*, 418 U.S. 323, 41 L.Ed. 2d, 789, 94 S. Ct. 299 (1974), which sets forth several rules to be followed:

(a) Mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth; rather, the publisher must be shown to have acted with a high degree of awareness of probable falsity.

(b) Allowing a publisher to avoid liability *only* by proving the truth of all injurious statements does *not* accord adequate protection to First Amendment liberties; the First Amendment requires protection of *some falsehood* in order to protect speech that matters.

(c) Some degree of "breathing space" is essential to the fruitful exercise of the press' First Amendment rights. "To that end, this Court has extended a measure of strategic protection to defamatory falsehood." 418 U.S. 342.

(d) "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." 418 U.S. 340. Note that "pernicious" is defined as "highly injurious or destructive; deadly; wicked".

(e) Our decisions recognize that a rule of strict liability that compels a publisher . . . to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship.

2. *The Colorado "Opinion" Cases.*

Bucher v. *Roberts*, 595 P.2d 239 (Colo. 1979) holding that the *initial* question of whether a statement constitutes a fact or an opinion is a question of law for the Court to determine. Once a Court needs to speculate as to the meaning of the statement, we enter the area of "opinion". The Colorado Supreme Court cites *Buckley* v. *Littrell*, 539 F.2d 882 (CA2 1976), for support. Interestingly, many of the *Buckley* terms are similar to the within case, such as "facist". See, also: *Burns* v. *Denver Post, Inc.*, 632 P.2d 280 (1980); and 606 P.2d 1310 (Colo. CA 1979).

As an aside, this Court feels that any distinction drawn by the decision rendered in *Walker* v. *The Colo. Springs Sun*, 538 P.2d 450 (Colo. 1975) regarding "malice" or "actual malice" to be pointless here, as Plaintiff falls far from proving either measure by the burden placed upon him.

3. *Di Leo's*, supra, admittedly stronger factual situation has been considered. In *Di Leo*, the Court found that Defendants had reliable sources and had performed a "thorough inde-

pendent investigation". In the case at hand, the sources are also reliable, but the application of "thorough" might be open to some question. It is this Court's opinion and finding that it was at least adequate; further, that we must look at each factual situation to arrive at a determination.

Here, we have a small town setting, far from that present in *Sullivan* v. *The N.Y. Times*. Under the facts related by the pleadings, affidavits, and depositions, checks were, in fact, made by Defendants, various sources were checked and investigations were made which this Court feels (and *finds*) were adequate and, in any event, certainly not "reckless".

This is especially true when we apply *Gertz* v. *Welch*, supra, and the pronouncement therein that the mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth; rather that the Defendant must be shown to have acted with a high degree of awareness of probable falsity.

4. *Other Authorities:*

(a) *"Defamation and the First Amendment"*, 52 Colo. Law Review 1 (1980).

(b) *Yiamouyiannis* v. *Consumers Union*, 619 F.2d 932 (CA2 1980), which is a well-reasoned opinion. The Court *first* held that the same principles are applicable to a summary judgment motion in a libel case involving a public figure (*Manuel* v. *Ft. Collins Newspapers*, supra). *Secondly*—that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth, but rather, that a high degree of awareness of probable falsity is necessary (*Gertz*, supra).

In upholding the trial court's granting of the motion for summary judgment, the Court stated that it was convinced (as was the trial court) that no reasonable jury could find *with convincing clarity*, on the facts in the record, that the Defendants acted with "malice", in the *Sullivan* v. *N.Y. Times* sense of that much abused term. The undersigned *finds* this to be true in the within case, also.

(c) *Lastly*, in regard to authorities, see the annotation at 61 L.Ed. 2d 975 entitled "Progeny of N.Y. Times v. Sullivan in The Supreme Court"; especially section 9 "Requirement of 'Actual Malice' ", section 9(b), page 996 regarding "reckless disregard of truth", and section 10, page 997 regarding proof of malice.

After reviewing the pleadings, affidavits, depositions and briefs of counsel, and applying the foregoing authorities thereto, the Court makes the following

IV. Findings And Order

1. The findings contained in the preceeding portion of this opinion are specifically adopted by reference herein.

2. The Plaintiff is a public figure for defamation purposes.

3. The Defendants took a position favoring the recall of Plaintiff as a county commissioner.

4. The recall effort was successful, as was Defendants' presentation of their position regarding it and their opinions as to the recall and as to Plaintiff.

5. Many of the items upon which the action is based are merely opinions which Defendants have the constitutional right to express.

6. Plaintiff's burden of proof, that of "clear and convincing", has not been carried by Plaintiff for purposes of the Motion for Summary Judgment.

7. No actual malice or a reckless disregard for the truth has been shown by Plaintiff.

8. In, fact, Plaintiff has failed to show, as a preliminary matter, that most of the statements complained of are, in fact, false. As to truth or falsity, however, there is a "genuine issue" which would survive a motion for summary judgment (but for the other failures of Plaintiff's proof), such as the evidence on both sides as to whether Plaintiff "lied" in regard to a threat of firing as to a county road employee.

10. In addition, the articles published regarding "Ananias Ziegler" were, in this Court's opinion, obvious satire which is, in the manner executed by Defendants, a proper exercise of First Amendment rights.

11. Plaintiff has failed to establish a prima facie case, by a sufficient quantum of evidence which can be equated with the "convincing clarity" or "clear and convincing" standard required of him as a public figure.

12. Defendants conducted a reasonable investigation of facts from reliable sources prior to the publications complained of; although not a completely thorough one, a legally acceptable one.

In summary, the Court finds that the publications were made in conjunction with a recall election as to which Defendants took a position against the Plaintiff Lane. Lane's main complaint appears to be directed towards Defendants' success in this endeavor and sidesteps the requirement of proof as to actual malice or a reckless disregard for the truth, neither of which are shown to any degree, much less by a "clear and convincing" margin. Recklessness is required—not mere negligence. While charges of specific criminal misconduct are *not* protected as opinion, if false, the within case deals with protected opinion and "views". Comments regarding mismanagement of a budget are protected. A newspaper's call for "honest" and "competent" government auditor is a legitimate exercise of the constitutional freedom permitted by the First Amendment, especially armed with the information Defendants possessed in this case.

Concern with "open" v. "secret" or non-public meetings has always been and should be a legitimate concern of the press, especially here when we again consider the information available to the Defendants.

Whether a statement is, in fact, a "lie" is subject to more than one interpretation. Here we must consider all of the information Defendants possessed regarding, for example, the

"threat" to the county employee from various sources; as to the V.A.S.I. lights, the information Defendants possessed from Mrs. Purdy and other sources. As to the increase in the mill levy or lack of same since Plaintiff was elected, the fact that it had been slightly increased is not disputed of record. The fact that Defendants were told by Plaintiff that there would be public meeting or notification of the same is aptly supported in the record.

We have, in summary, protected opinion, political satire, rhetorical hyperbole, albeit at times caustic and perhaps pernicious, much of which is supported by truth in the first instance.

When this is combined with the Plaintiff's total failure to carry his burden of clear and convincing proof as to malice or actual malice or a reckless disregard for the truth, we leave the court with but one alternative, to grant the Motion for Summary Judgment.

IT IS, THEREFORE, ORDERED:

1. THAT the Motion for Summary Judgment be and the same is hereby granted.

2. THAT the within matter is dismissed.

DATED this 25th day of September, 1981.

BY THE COURT:

Paul J. Keohane
Judge

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APPENDIX B

COLORADO COURT OF APPEALS

No. 81CA1090

JOHN LANE,

Plaintiff-Appellant,

vs.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants-Appellees.

Appeal From The District Court Of Fremont County

Honorable Paul J. Keohane, Judge

JUDGMENT AFFIRMED

DIVISION I
Opinion by JUDGE STERNBERG
Berman and Coyte*, JJ., concur

Spurgeon, Haney & Howbert, P.C.
Gregory R. Piche
Nancy Chase Miller
Colorado Springs, Colorado
Attorneys for Plaintiff-Appellant

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*Retired Court of Appeals Judge sitting by assignment of the Chief Justice under provisions of the *Colo. Const.*, Art. VI, Sec. 5(3), and § 24-51-607(5), C.R.S. 1973 (1981 Cum. Supp.)

Cooper and Kelley
Thomas B. Kelley
Paul D. Cooper
Denver, Colorado
Attorneys for Defendants-Appellees

The plaintiff, John Lane, brought a libel action against the Arkansas Valley Publishing Company, publisher of The Mountain Mail; Merle Baranczyk, the newspaper's editor; and Ed Quillen, reporter and columnist. The defendants' motion for summary judgment was granted and the trial court dismissed the action. Lane appeals and we affirm.

A series of articles, most of which were satirical in tone, was published in The Mountain Mail, a newspaper serving the town of Salida and surrounding areas of Chaffee County. At that time there was a campaign to recall Lane from his position as county commissioner. The articles, which appeared in signed columns and editorials, were critical of Lane's performance of his official duties. The recall effort was successful, and Lane asserts that his recall was the direct result of damage to his reputation caused by defamatory statements in the articles.

Alleging that the statements complained of were constitutionally privileged as opinion and political rhetoric, the defendants moved for summary judgment. In the alternative, they requested a determination of which statements were privileged and which were not so that discovery and trial preparation could proceed. In their brief in support of the motion for summary judgment, the defendants analyzed each article, to demonstrate that each one was an opinion with a factual basis. Attached to the brief as exhibits were the news stories from which the facts were taken.

Lane argued in his brief in opposition to defendants' motion that the statements labelled by defendants as opinion imply that he has committed illegal acts, and that they suggest the existence of an undisclosed, defamatory factual basis. He did not refute the factual basis, but did submit affidavits of individuals who initially had interpreted the satirical articles in their literal sense.

At the outset of the hearing on the motion for summary judgment the defendants stated that it was their intention to focus on whether there had been false statements, reserving the issue of malice for trial or a later motion. They then addressed each article and demonstrated that the facts contained therein had been the subject of prior news articles, the truth of which was not disputed. Lane prefaced his argument by redefining the scope of the hearing to whether the articles were statements of fact or opinion. He reaffirmed this understanding at the close of the hearing, stating that "malice and the factual issues" would be addressed at a later time, and the court agreed to this limitation.

The court granted the motion for summary judgment, ruling that the statements were constitutionally protected opinions, and that Lane failed to carry his burden of proof on the falsity of the factual assertions and defendants' malice or reckless disregard for the truth.

On appeal, Lane argues that the trial court erred in rendering a decision on issues not before it and in its conclusion that the articles were constitutionally protected opinions.

I.

We hold that it was proper for the court to address the issues of falsity and reckless disregard for truth on the motion for summary judgment.

C.R.C.P. 56(c) provides that a summary judgment may be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact, and that the moving party is entitled to judgment as a matter of law. Once a movant makes a convincing showing, C.R.C.P. 56(c) requires that the opposing party adequately demonstrate that a real controversy exists. *Ginter* v. *Palmer & Co.*, 196 Colo. 203, 585 P.2d 583 (1978).

Both parties' trial court briefs addressed the full range of issues despite the limited scope of the hearing, and the court did not err in basing its ruling on the briefs and supporting materials in the court's file. In a different setting the Supreme Court stated:

> " 'Defendant urges that this question of law cannot be determined until the court is apprised of all the facts. However *on the facts submitted* if the question of law is capable of determination the decision should not be withheld because of a claim of other facts, not disclosed, which might result in a different determination. . . .' It is apparent from the matters that were before the court that a different result would not have been obtained had the president of the company been called as a witness to testify on the issue. . . ." *Norton* v. *Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961) (emphasis in original)

Here, the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether defendants acted with reckless disregard of whether they were false or not.

II.

Turning to the substantive issues, we address first the trial court's conclusion that several of the articles were constitutionally protected opinion, and agree that the trial court properly granted defendants' motion for summary judgment with respect to these articles.

Remarks disparaging the conduct of public officials must be considered against the background of a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York*

Times Co. v. *Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To that end, the Supreme Court extended special protection to political opinions when it stated, "[T]here is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas." *Gertz* v. *Welch*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974).

In *Bucher* v. *Roberts*, 198 Colo. 1, 595 P.2d 239 (1979), the court adopted the approach of the *Restatement (Second) of Torts* § 566 (1976) to determine whether a statement is one of fact, and thus actionable, or one of opinion. Using that approach, the court held a statement which is ostensibly an opinion is actionable "only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion." Comment c of *Restatement* § 566 elaborates on this point, stating:

> "If the defendant bases his expression of a derogatory opinion on the existence of 'facts' that he does not state *but that are assumed to be true by both parties to the communication*, and if the communication does not give rise to the reasonable inference that it is also based on other facts that are defamatory, he is not subject to liability, whether the assumed facts are defamatory or not." (emphasis added)

The Supreme Court reaffirmed this analysis in *Burns* v. *McGraw-Hill Broadcasting Co., Inc.*, ___ P.2d ___ (No. 81SC121, announced February 22, 1983), but added additional inquiries. Citing *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980), the court enumerated factors to be examined when the speech at issue might be considered protected opinion: whether the statement is prefaced by the phrase "in my opinion" or language of similar import; the entire context of the statement; and the circumstances surrounding the statement, including the medium through which it is communicated and the audience to which it directed.

Using this line of inquiry, a comment may appear on its face to be a statement of fact, but when considered in its context

would readily be perceived to be rhetorial hyperbole, and not intended to be understood in its literal sense. *See National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974); *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 90 S.Ct. 1537, 26 L.Ed.2d 6 (1970). This approach expressly recognizes that comments made in the context of a hotly contested political campaign should not be judged by the same standard as those made in other contexts.

An article in the form of an opinion which could imply the commission of illegal activity is actionable if the context in which it appears suggests it was meant literally. *Cianci* v. *New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980). But, it is not actionable if it would be understood as rhetorical hyperbole meant to express an opinion on the plaintiff's performance of his job. *Okun* v. *Superior Court*, 29 Cal.3d 442, 175 Cal. Rptr. 157, 629 P.2d 1369 (1981); *Palm Beach Newspaper, Inc.* v. *Early*, 334 So.2d 50 (Fla. App. 1976).

In *Information Control Group* v. *Genesis*, *supra*, the court held that comments clearly going to the merits of a controversy under public scrutiny, but which could have been interpreted as a charge of illegal activity, were not libelous because in that context an audience may anticipate efforts to persuade by the use of rhetoric and epithet. The same was true of statements made in *Okun* v. *Superior Court*, *supra*, in the context of a campaign to repeal a city ordinance.

Use of the technique of satire, as in many of the articles here, does not alter the analysis. The particular style of writing involved is part of the "context" to be examined when determining whether the statement could reasonably be understood as an assertion of fact. As with other forms of expression, if a satirical writing reasonably implies the assertion of a factual charge that would be defamatory if made expressly it is not protected by the cloak of constitutional privilege. *Pring* v. *Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982); *Restatement (Second) of Torts*, *supra*

(comment d). *See also Hill; Defamation & Privacy Under the First Amendment*, 76 *Colum. L. Rev.* 1205 at 1310 (1976).

A.

The first article complained of is a column published on May 4, 1979, in which the author purports to quote from a letter attributed to Lane. The letter is signed by "John Lane, Supreme Commander" and informs county employees of a new personnel code along the lines of a code for military discipline. The article also comments on an incident involving so-called "secret meetings." Both of these topics had been the subject of extensive reporting and controversy, as evidenced by defendant's exhibits. Lane alleges that this letter defamed him by portraying him as anti-democratic and militaristic.

Taken out of context, the article appears to assert that Lane was the author of such a letter. Although admittedly false, that in itself is not actionable libel because the context of the letter must be considered to determine whether it may reasonably be understood to imply the assertion of fact. As with the article in *Myers* v. *Boston Magazine Co., Inc.*, ___ Mass. ___, 403 N.E.2d 376 (1980), in which a sportswriter stated that a sportscaster was enrolled in a remedial speech class, the format and language indicates the letter was a tongue-in-cheek effort to portray the author's opinion of Lane's personnel policies and conduct of office. The factual basis for the opinion is disclosed in the article. Thus, the trial court was correct in granting summary judgment with respect to this article. *See Restatement* § 566, *supra*.

B.

Lane complains of articles published on October 5, 1979, November 8, 1979, December 6, 1979, and January 18, 1980, in the form of conversations with a character named "Ananias Ziegler," which the trial court labelled "obvious satire" and protected by the First Amendment. We note that "Ananias" is a biblical character noted for untruthfulness, while "Ziegler" is the surname of former President Nixon's press secretary. The

article in which the character is introduced informs the reader that Ananias Ziegler formerly was in charge of inflating body counts in Vietnam, did public relations work for former President Nixon, and was hired by Lane with county funds to respond to the recall campaign. The articles comment on Lane's efforts to fight the recall effort, his decisions on housing development, his campaign practices, a proposed budget, and expenses to retain an independent auditor.

Lane contends that these articles are factual assertions that he committed illegal acts by hiring Ananias Ziegler with county funds for personal gain. He also asserts the articles imply the existence of an insider who acknowledges that Lane ignored the official hiring procedure, is partial to real estate developers, is not concerned about the legality of his campaign, and holds a cynical and contemptuous attitude toward the public.

Here, in the context of a heated recall campaign, the trial court correctly concluded that the comments of a fictional character with an unlikely background cannot be taken as serious allegations of illegal use of county funds or other illegal activity and were protected opinions. Moreover, to the extent that the comments allude to a factual basis, because defendants demonstrated that these facts had been the subject of news articles and Lane submitted no evidence to the contrary, Lane did not sustain his burden of making a prima facie showing that defendants published defamatory falsehoods with reckless disregard of whether they were true or false. *See DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980).

C.

Two articles published on November 30, 1979, and February 15, 1980, entitled "The Mail's Opinion," speculate on how a new ordinance will be enforced, make a general charge that county administration is disorganized, allege that funds are not wisely spent, contend that public opinion is ignored, and make other assertions. The articles contain the facts upon which the comments are based. The facts having been disclosed in the arti-

cles, and there being no charge that the facts are false, these articles are protected opinions as well. *Bucher* v. *Roberts*, *supra; DiLeo* v. *Koltnow*, *supra*.

In the context of intense political debate, where the audience may anticipate efforts to persuade by the use of fiery rhetoric or hyperbole, the articles we have considered in this section II are in the realm of opinion. *See Okun* v. *Superior Court*, *supra*.

III.

We now address Lane's claim that certain editorials contained erroneous factual assertions that were libelous. In editorials published September 21, 1979, October 11, 1979, and October 19, 1979, defendants criticize budget decisions and charge Lane with holding secret meetings and lying. They are not couched in satirical language, and, in contrast with other language about plaintiff's suspected motivation, attitude toward the public, or competence as county commissioner, these statements may reasonably be interpreted as assertions of fact rather than protected opinion.

When a communication involves a factual assertion, to survive a motion for summary judgment, a plaintiff must present a prima facie case that the defendant published defamatory falsehoods with actual malice, and make this showing with convincing clarity. *DiLeo* v. *Koltnow*, *supra*. An opposing party may not rest on the mere allegations of his pleadings; rather, he must set forth specific facts showing there is a genuine issue for trial. *DiLeo* v. *Koltnow*, *supra*. The trial court ruled that Lane did not meet this burden, and we agree.

In this case, in support of their motion for summary judgment defendants submitted excerpts from depositions and news articles demonstrating the factual basis for the editorials. Lane was unable to show in response that the factual bases were false or that defendants did not undertake a reasonable investigation before publishing the editorials. It was Lane's responsibility to present a genuine issue whether defendants published alleged defamatory falsehoods knowing them to be

false, or with reckless disregard as to their truthfulness. *DiLeo* v. *Koltnow*, *supra*. This Lane did not do; thus, summary judgment was properly granted.

The judgment is affirmed.

JUDGE BERMAN and JUDGE COYTE concur.

APPENDIX C

SUPREME COURT, STATE OF COLORADO

Case No. 83SC223

CERTIORARI TO THE COLORADO
COURT OF APPEALS 81CA1090

ORDER OF THE COURT

JOHN LANE,

Petitioner,

v.

ARKANSAS VALLEY PUBLISHING CO, *et al.*,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of the Court of Appeals,

It Is This Day Ordered that said Petition for Writ of Certiorari shall be, and the same hereby is, Denied.

BY THE COURT, EN BANC, December 19, 1983

J. QUINN WOULD GRANT.

cc: Mac V. Danford, Clerk
Colorado Court of Appeals

Gregory Piché
Nancy Chase Miller
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Thomas Kelley
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APPENDIX D

QUILL IN HAND

AND NOW, A SECRET DOCUMENT FROM THE COUNTY FILES
BY ED QUILLEN

I have never been a great reporter. Early in my journalistic career (it was about my second day on the college paper 10 years ago), I noticed that editors did all the yelling and went out drinking while reporters were still toiling, and I resolved to be an editor.

Two days later, due to a quirk of campus politics, I was an editor, and I have yet to draw a paycheck as a reporter.

Consequently, my reporting triumphs have been few and far between. In 1971, after examining reams of college budget and audit reports, I discovered the president of the institution had been playing a few games with federal contracts.

The ensuing stories led to his resignation, and, at the tender age of 20, I had worked muckracking out of my system.

Thus, I've never, in my professional career, had a triumph such as the Salida Fire Department Personnel Files or even the Pentagon Papers.

But I recently came across a document that deserves wider publicity than it has had; a county employee slipped it to me.

As nearly as I can tell, it's the cover letter for the new county personnel code. I didn't manage to get the policies, but the letter should quell many people's fears.

"TO ALL PERSONNEL:

"You have probably been hearing about the new personnel policy which we plan to institute across-the-board. Unfortunately, you probably got this information from the scheming, left-wing malicious lying radical liberals infesting our local news media, and so it has been untrue and biased.

"Those parasites and malingerers have even printed accusations that Admiral Welker and I are attempting to institute some sort of military dictatorship.

"Nothing could be further from the truth. The civilian personnel of this region made it quite clear that they want us to provide an efficient, combat-ready county government, and we cannot desert our duties.

"You will notice some changes in nomenclature and command structure, but these changes should not affect your daily routine, which will begin with roll call at 0600 hours and end with taps at 2200 hours.

"This code is not as harsh as the rumors have had it. Violations will be handled at lower levels with company- and field-grade Article 15 proceedings, and only in severe or flagrant cases will a court-martial be necessary.

"This information is for county enlisted personnel only, and anyone violating security and document classification systems by allowing it to fall into civilian hands will be subject to charges of espionage and treason.

"As you know, no one wants an open command structure more than I do, and we cannot maintain one if we have security risks in our midsts.

John Lane
Supreme Commander"

Something like this should quiet down all those people who might have believed Dick Tuttle when he said something about a military dictatorship taking over the courthouse. There are always Nervous Nellies and alarmists running around, saying the commissioners are tying to run the whole courthouse, but that can't be true.

I mean, I would never believe the rumor than Lane and Welker just spent a bushel of county time and money in Denver, trying to find a way to force their personnel code into all departments, including those run by other elected officials.

Who could believe that Landslide Bob and Honest John would try such a blatant usurpation of power?

And I believed John Lane when he said "Nobody wants an open government more than I do." But it did make it difficult to believe him a few minutes later when he invited anyone who wanted a secret meeting with the commissioners to call him and trust him to make the arrangements.

Bob Welker makes it hard to believe, too. Not long ago, he said the voters of the county made it clear they were concerned about investment policies. Robert Barnes ran for treasurer on precisely that issue, and got trounced for his trouble.

Many of my faithless friends said that meant the voters of the county didn't give a fat damn about investment policies, but, as Tug Mcgraw used to say, "You gotta believe." And P. T. Barnum noted something about a believer being born every 60 seconds.

QUILL IN HAND

THEY DON'T HAVE MUCH TO BRAG ABOUT
BY ED QUILLEN

I had occasion to visit the county commissioners Tuesday along with a number of other editors, reporters, etc., all of whom were concerned about the commissioners' habit of holding unannounced meetings, throwing people out of those meetings, announcing decisions without public input, and so forth.

We even brought along a lawyer to make it clear that the state legislature and supreme court do not condone this sort of activity.

In fact, I tried to make it clear to Bob Welker that it was a bit hypocritical for him to campaign on the issue that Mark Van-

derpool could not choose which state laws to obey, while the current commissioners act as though the open meetings law does not concern them.

However, it was difficult to address Bob at that meeting, because he kept wandering off. Is that the way he generally treats all citizens who come to the courthouse to meet with the commissioners? Maybe the prospect of getting their names and views in the papers does not scare citizens off as much as the fear that they will be treated with the same contempt and disinterest we received.

And during the meeting, John Lane kept acting as if he couldn't be a "full-time" commissioner if all meetings were to be public.

That isn't true, and he would have known better if he had paid attention. There's nothing illegal or improper about a citizen meeting privately with one commissioner.

When there are two or more commissioners together, though, that's a meeting, and it's public. The only way it can be private is under very specific grounds which are clearly laid out in the law.

Of course, the legal advice our commissioners use our tax money to pay for seems strange to me. Ken Baker, the county attorney, talked constantly about how difficult and inconvenient it is to obey the law.

I'm sure Harold Thonhoff and Leonard Post hear the same thing frequently, but they doubtlessly think it's a pretty lame excuse, and so do I.

And when our lawyer, Al Sulzenfuss, provided copies of the appropriate laws and court decisions, Baker said he might read them, if he found time. We taxpayers pay an $800-a-month retainer to Baker, and he says he might read the laws if he has time. That might be one of the problems in the courthouse.

Now Welker and Lane are both devout Republicans, and Republicans generally trumpet their belief in free enterprise.

Yet this duo seems to do everything possible to prevent private businesses from gathering and selling information.

Lane did bring up an interesting point. He said that, despite the problems, we're getting better results from our county government now.

I wonder if we're getting any results. Consider what's happened since Lane and Welker took office.

Before the election, both said housing was a big problem, and they would be working on it. There was a chance the county could participate in a program whereby tax-free bonds could have been issued, so the proceeds could be used to make housing loans.

The federal government has clamped down on it, so it would be impossible now, but if they had gotten going in November, there might be more, and cheaper, mortgage money available here. That is, if we are indeed in the throes of a housing shortage, and it was not merely something mentioned in the campaign, like Kennedy's "missile gap" in 1960.

Or what of the housing complex for senior citizens? There was a big to-do, and now there's nothing.

Lane once told a reporter that a potential developer of a senior housing complex read a story where Bette Cook had criticized certain elements of the planning for the senior citizens home, and decided to back out, and that's why nothing has been done.

Is that our fault for reporting what happened at a public political meeting? Or Bette Cook's for speaking her opinion, which she has every right to do? Or should the county be dealing with someone afraid of being questioned? Or was Lane making it up to cover the commissioners' inertia? You've got me.

Let's see. There are the county roads. I remember reading how scandalously the previous boards had handled the roads, how the county didn't even have surveys or title to many of them, and that something had to be done quickly.

Nothing has been done about that, of course. Aren't you glad we have full-time commissioners?

What else? There's the dog-control program. It's easy to see that Welker cares plenty about Buena Vista and not a whit about the rest of the county.

That might please some of his constituents, who see him as Brave Bob down here battling the Vested Interests in Salida, but it's a little more complicated than that, because his constituents actually live all over the county, although it seems as though Bob has never remembered that since the election.

Anyway, Salida's part of the county dog-control program was working, and Buena Vista's wasn't. As a reward for having an efficient city government and police department which can keep people on the payroll, we Salidans get to pay twice for dog control. Welker, of course, doesn't give a damn about Salida, but I do, and I resent the other commissioners (who have mentioned privately that they think Welker's dog program borders on the insane) allowing it to go on.

And besides that, poor Leonard Post, attempting to enforce the dog laws, was told one thing on Friday by Lane, and an entirely different thing on Sunday by Welker. If the commissioners made recorded decisions at public meetings, this sort of confusion might be avoided.

Is this what we're getting from full-time commissioners? If so, I submit they go back to part-time status. It would give them less time to screw things up.

We had a truck route, which was hammered out with a great deal of difficulty and approved by a previous board, changed because John Lane and a driver or two didn't like it.

Last winter, we had Welker announce a county snow-removal policy, and then a few days later, we discovered there was no such thing. A man less charitable than me might say he had been lying. I just figure he didn't know what he was talking about.

Every week, someone comes before the board asking it to do something to bail out the local tourist industry, and the board acts interested. But then, when it comes time to spend $500 on something which not only brings tourists, but keeps local people here and local money in the economy, namely the HRRA fireworks, the commissioners turn it down.

However, their aversion to such spending apparently hasn't affected Welker, who went along with the cuts in donations at budget time, but later promised Buena Vista $2500 of county money for its centennial celebration. I haven't heard much about that $2500 lately, but maybe some centennial commission members will visit the courthouse and find out if Welker's word can be trusted.

Then there was Lane's allowing a builder to get free adobe from a county facility because there had apparently been a policy allowing that to be done. County crews even loaded it. Maybe that's a good policy, to help a housebuilder in need, but we can be grateful he didn't need bricks, or a wing of the courthouse might be missing.

And what have they done about growth, which they've all said was going to be a big problem? I remember them approving a house whose water came from a cistern, with Lane saying it opened up exciting possibilities for development. If my friends were contractors, I might agree with him.

But as it is, controlling water is about the only way to channel growth, and if you remove that control, you remove whatever hope the county might have had of coping with a boom, if one ever materializes.

Is this how the county controls growth? No, the commissioners turn a sympathetic ear to every developer who comes in to complain about the existing laws.

Other counties have faced the same problems which Chaffee might face, but do our commissioners go to the orientation meetings for new commissioners, where they might learn something? No, when they visit Colorado Counties, Inc., it's to find a way to ram their personnel code through.

As nearly as I can tell, the only groups to benefit from the new regime in the courthouse have been us and the county employees. We suddenly have plenty of issues and news about contradictory statements, clandestine meetings, outright lies, outrageous promises, etc.

And county employees have been hauling in some good pay raises.

Now, Welker said something derogatory about "Quillen's kind of journalism," at Tuesday's meeting. Maybe he thinks newspapers should print only what the local commissar tells them to print, just like Pravda does.

I don't know what's so terrible about it. All I want to do is exercise my rights as a citizen to find out what my employees are doing at the courthouse, and exercise the rights all Americans have to comment about public officials.

And if the commissioners don't believe in those rights, which seems to be the case, I wish they'd just say so. I get so sick of these pompous claims about what a fine county government we have, when all we get are half-baked schemes, no follow-up to grandiose proposals, evasions of state law, and a county attorney who's too busy to read the law.

After compiling this dismal and dreary litany of failure in the commissioner's office, I think I know why they're so enamored of secrecy and private meetings. It's quite likely that they just don't want anyone to know what utter fiascos they've been at the jobs they set out to do.

They certainly don't have anything to brag about.

PLAINTIFF'S EXHIBIT

QUILL IN HAND

WHAT SERVICES WILL BE CUT BACK? BY ED QUILLEN

I find from reading John Lane's column that the "battle of the budget" is coming up at the courthouse, and that, in order to preserve the sacred Mill Levy, some services will have to be cut back.

Knowing our board of commissioners, I find it easy to know what will be cut back. After all, Honest John has written that we don't want to have county government "in excess."

But he and his cohort, Bob Welker, have managed to extend county government to all manner of excess by passing the rubbish ordinance.

It strikes me that what a man keeps on his property is his own business, unless there's a health or fire hazard involved. Then his neighbors, in the form of county government, would be justified in intervening.

The county already had those powers. The newest power grab emanating from the courthouse is such a vaguely-worded conglomeration that it could be stretched to cover damn near anything you might keep around the yard.

Of course, our commissioners assure us (remember their assurances about an open government) that the ordinance will be enforced with discretion. That means selective enforcement—some lawbreakers will be subject to it, while others won't. That is not what is known as "equal justice under the law," but it is a good way to harass people.

Since nearly everyone who has so much as a sawdust pile on his place will be breaking the law, and I haven't heard that two

dozen sheriff's deputies have been hired to enforce it, it means certain people will be singled out.

Now, it won't be people with real hazards on their property, because the county had laws to deal with that problem.

The only reason I can imagine is that some second-home owner, having just paid $80,000 for his five-acre view of the Sawatch Range, will get upset because some real country people live nearby—people with sawdust, board and manure piles on their property. Since the second-home owner's property value might diminish due to its proximity to those piles, the ordinance will help protect his property value.

In fact, from the way Lane acts, you'd get the idea that preservation of property values was part of the oath of office, especially if that property belongs to rich people.

Rich people, who can afford to own property they don't use, will love this trash ordinance. They're also the people buying the "many fine homes" out on the mesa, and their view is impaired because of the county road shops. Lane wants to use everyone's tax money to move the shops so their view will be improved.

So you can bet that, when the "battle of the budget" gets going fast and furious, it won't be the wealthy who suffer from any cutbacks in county services.

What are the logical candidates for cutbacks?

Well, I'd hate to be planning West Central's budget for next year. The wealthy can afford their own psychiatrists, and they live in neighborhoods not often troubled by night-time noises of drunks, psychos and people screaming at each other.

The rest of us, even if we pass for being sane, have to put up with these problems, and they'll get worse if West Central has to cut back.

And I doubt the library will see much money. After all, we should be self-reliant, John Lane told us so, so if you want to

read, you'd better plan on buying your own books. Or maybe you should write one.

But rest assured. The county will have its computers, and the county employees will keep up with inflation. The county equipment will get studied, and the Canon City auditing firm will get paid.

The county will continue to sign open-ended contracts to clean up trash (wouldn't you like to have an "understanding" good for $50 an hour with no maximum and few specifications?), and we'll still have an open government, despite the private meetings.

After all, government has to stick to essentials. Honest John told us so.

QUILL IN HAND

HOW THEY'LL HANDLE A PUBLIC-RELATIONS CAMPAIGN
BY ED QUILLEN

On one of my infrequent visits to the courthouse the other day, I chanced across another new county employee, a Mr. Ananias Ziegler, Lt. Col., USAF, Ret.

Since I wasn't too familiar with his job, and found he had an interesting one after chatting with him for a few minutes, I thought I would share the conversation with both readers of this column.

Quillen: I haven't seen you around here before, and I haven't heard anything about the county hiring you. Could you tell me what you do?

Ziegler: I'm the new county public-relations director, and I'm going to be handling John Lane and Bob Welker's responses to the recall campaign, among other things.

Quillen: How did you get the job?

Ziegler: Well, when I retired from the Air Force, where I used to be a public information officer in charge of inflating

body counts, sending out hometown press releases, and making sure the commanding officer looked good, I moved up here. And after I saw the problems Lane and Welker were having in presenting a good public image, I went to a private meeting with them and presented a proposal.

Quillen: And what happened? We sure didn't carry anything about that meeting.

Ziegler: Well, I told them the county was in sore need of a good public-relations program, and I mentioned that Fremont County was considering one. Then I brought out my military experience, and they immediately offered me a contract, at $100 a day, as a special public relations advisor.

Quillen: What's your strategy going to be on the recall drive?

Ziegler: Oh, pretty simple. First, I'll tell them to pretend like it isn't happening, that it doesn't exist.

Quillen: And then?

Ziegler: Well, then they'll make the usual statements that it represents only a small group of disgruntled radicals who do not represent the feelings of the hard-working, decent and law-abiding people of the community.

Quillen: What happens if the recall movement keeps going after that?

Ziegler: Well, then we'll start blaming the news media for inaccurate reporting of the commissioners' activities and for blowing the recall drive out of proportion.

Quillen: But they've never complained about inaccurate reporting of their meetings yet. Won't it sound kind of funny if they start complaining when the hot water starts rising, and not before?

Ziegler: Well, I'm an expert. I've been through this before. I was at the White House six years ago, and look how long Nixon was able to hold on, blaming Congress, blaming the press,

blaming everybody, even his own staff. I'm sure I'll be able to shift the blame around and get people to forget recall and start looking for somebody else to be mad at, such as the press. And we can always blame a recall drive on partisan politicians who are unwilling to accept the judgment of the people as to who should be running the county.

Quillen: Boy, it does sound like you've got your strategy prepared.

Ziegler: That's right. Any day now, you'll start hearing statements from them dismissing the recall drive as being beneath notice.

Quillen: By the way, were you hired through the new county personnel code?

Ziegler: Of course.

Quillen: Why wasn't the job advertised, then? I might have wanted to apply for it myself since the pay's so good.

Ziegler: Oh, you're really stupid if you believe that blue book is the official personnel code. The official one, the one they go by, is unwritten, but it specifies that the way to get a county job is to suggest a new program, such as dog control, a computer, or centralizing the road system.

Then you take the program to the commissioners and they'll hire you to run the program you suggested. It helps a lot if you're retired, especially from the military.

Quillen: Well, thanks for your time. I've really learned a lot about what to expect.

Ziegler: You're not printing any of this are you?

Quillen: Of course I am.

Ziegler: Then you can expect the commissioners to deny I even exist if you print this interview.

QUILL IN HAND

ANOTHER VISIT WITH ANANIAS ZIEGLER
BY ED QUILLEN

Not long ago, while indulging in a newspaperman's favorite hobby (nay, make that a compulsion), I was doing inventory research at a number of establishments on Lower F Street as to whether they stocked rye whiskey or not, and I ran across an old acquaintance—my good friend Ananias Ziegler, director of public relations for County Commissioners John Lane and Bob Welker.

Ziegler was in a good mood, which surprised me, since the recall appeared to be well underway, so I figured it was time to indulge in more conversation, which I will share.

Ziegler: Quillen, I see you went ahead and printed that last interview. At first, that reprehensible action confirmed my low opinion of you and your kind of journalism, but let me buy you a drink anyway. What're you having?

Quillen: I'd like a shot of rye and a bottle of Pabst. But why are you buying me a drink if you don't like me?

Ziegler: It's part of our new public relations campaign—we're going to be nice to everybody, including the press and act like we take their opinions seriously.

Quillen: Is that why I saw Bob Welker in the office the other day, asking for our input on a new county purchasing policy?

Ziegler: Why did you have to ask? Were you born yesterday, or something?

Quillen: I figured as much. What else are you up to?

Ziegler: We're looking at it from a number of angles, and we may be able to pull it off, providing the commissioners take my advice. Welker didn't, at first, and he damn near got us in trouble.

Quillen: How was that?

Ziegler: Oh, when he said something about a political machine being behind the recall, and then he said somebody should ask Wayne Wall if he planned to run for commissioner. This isn't the time to act like you have all year, you know, and I had to get to Welker fast.

Quillen: I saw what happened. Now he's acting like Wall is an upright citizen doing what he has to do.

Ziegler: Precisely. And if you listen to Welker lately, he's sounding like a statesman, urging everyone in the county to pull together and forget about the recall, that he's learned his lesson. Sounds pretty good, doesn't it?

Quillen: Do you think people will go for it? And besides, once you start the recall machinery going, it goes. It doesn't matter whether Welker or Lane or Wall or anybody has a change of heart.

Zielger: I know that, but it sure sounds good—I'm going to make Welker sound like a statesman before everything is said and done.

Quillen: That's going to be quite an accomplishment.

Ziegler: Yeah, I've got my work cut out for me. But we're working on some other angles, like getting the recall thrown out on some legal technicalities, although I advised against it. I told them they should say they welcomed it as a chance to get another "mandate" from the public to continue doing business the same way. But they wouldn't do that, they decided to fight it through the clerk's office and the courts. It looks degrading to me, and it's going to come across as an effort by two men to thwart the will of the people, but that's the way they want it, so that's the way we'll go. I'm just trying to put the best possible light on it, like it's an attempt to protect the office, rather than a way to keep them in the office.

Quillen: What else? What about this direct-mail campaign last weekend? Who's behind that?

Ziegler: Well, we're trying to keep that a secret. You have to realize that the commissioners do have their friends, even if they aren't very vocal at the moment. Real estate developers, for instance, think very highly of a county board that's never denied a subdivision or a Senate Bill 35 exemption. They like the idea that the commissioners are looking for ways around the state's well restrictions. I mean, whenever you've got a government going along with greedy schemes, it'll have some support.

Quillen: Is that who's behind this? It strikes me that it's pretty cowardly to send out propaganda from "Concerned Citizens of Chaffee County," without saying who those concerned citizens are. And besides that, it's probably illegal.

Ziegler: Well, nobody around here cares whether you campaign legally or not. Remember the unidentified fliers the Republicans sent out in the 1978 elections? Did that keep people from voting for Welker, even though he was the county Republican chairman? Of course not.

And does it matter who paid for that mass mailing? It offers some important information.

Quillen: How can you say that? It says the 1980 budget is "balanced and restrained," and the 1980 budget hasn't even been adopted yet. It says we've got this county personnel policy, and yet Lane said he wasn't sure what was in the county personnel policy. It extolls the commissioner's new insurance policies, and it doesn't mention that Welker wanted to cancel all the county policies on a moment's notice. It praises the audit—from a company that's so good that it can't tell you how much it will charge for an audit, from auditors who criticize the cash flow procedures in offices they haven't even been in.

Ziegler: Well, it may be a pack of lies, but you have to remember that people who believe Lane and Welker will believe anything.

Quillen: They'll even believe that "John and Bob will listen"?

Ziegler: Of course. They're the same people who believed Welker when he said that a recall election would cost $15,000 or $20,000, based on his "research," even when it quickly became apparent that he hadn't done any and didn't know what he was talking about. And you have to remember—this is our new campaign. They're going to be exemplary county commissioners—seeking public input, making sure they hold public meetings, being direct and honest with the public—they'll be great commissioners.

Quillen: But for how long?

Ziegler: Until Dec. 18, of course. Then, if we win, it'll be back to business as usual.

PLAINTIFF'S EXHIBIT

QUILL IN HAND

AND THE IMAGINARY FIGMENT SPEAKS AGAIN
BY ED QUILLEN

I could barely make it through the crowd of festive people at the celebration at the home of Ananias Ziegler the other night following the ruling of the judge who couldn't tell Salida from Canon City. Wearing a disguise, I felt safe but uncomfortable when I heard my name mentioned in the same sentences with tar barrels, feather, rails and ropes, for the crowd was happy that the recall election had been thrown out, and it sounded as if people would have been happier if I had been thrown out, too.

Hard-working satirist that I am, I knew I had to get Ziegler's reaction to the court ruling, and he had invited me.

Eventually, I found the retired Air Force Lieutenant Colonel, now the Director of Public Relations for the Chaffee County Commissioners, and we had a chance to talk. What follows is a transcript of the conversation.

Ziegler: Ed, I'm glad you could come out here—but I don't know why everybody is so happy and acting like it's all over—I've still got plenty of work ahead of me.

Quillen: I thought you might—that's why I wanted to see you. Their public image is still in need of some work.

Ziegler: That's for sure. I need to do some work on my own image by making it disappear. Ever since you found me and irresponsibly wrote about me, there's been hell to pay. So we put out this rumor that I'm just a figment of your demented imagination—and it's working, but I guess there are still some people so stupid that they believe I really exist.

Quillen: Isn't there a saying about that, something like "You can welker all of the people some of the time; you can lane some of the people all of the time; but you can't nixon all of the people all of the time?"

Ziegler: Sayings like that are one reason I've got to keep working on their image, recall or no recall. And it hasn't been easy—especially Bob Welker. If I could just get him to check with me before he opens his mouth, our campaign would go a lot better.

Quillen: What did he do this time?

Ziegler: Oh, they devoted another one of their meetings to a press conference blasting a newspaper story. And Welker sat there saying that the difference between "adjournment" and a "recess" was just a semantic quibble, one that didn't mean anything, just because he wasn't smart enough to know one from the other.

And then he runs into the courtroom and argues that anybody circulating a recall petition should be bound by the letter of the law. It sounds like he's trying to have his cake and eat it too, and how in the hell can they expect me to improve the public image of anybody that's so inconsistent?

Quillen: You really sound depressed. How are you going to handle the next year, providing they stay in office?

Ziegler: I've been working on some strategies. I think we'll start saying that it's unpatriotic to criticize county officials, and that anyone who doesn't like Lane and Welker has to be supporting the Ayatollah's kidnapping of American citizens. If we do it right, we ought to be able to get a lynch mob fired up for the next person who publicly criticizes the commissioners.

Quillen: That's sinking pretty low.

Ziegler: Maybe you're right. I'm just glad I plan to quit before the next budget. The 1981 budget is going to be tricky to explain and maintain their image as fearless tax cutters and friends of efficiency. So far, anyway, we've got the public believing that spending $4500 to find that $45 was missing from the sheriff's department six years ago represents efficiency in government.

But they managed to fund everything this year without much of a tax increase because they took out half of the carry-over money. They aren't going to be able to do that next year, and that means there's going to be a tax increase. I don't have to be around to try and sell that one.

Quillen: What about their current statements?

Ziegler: Since they manage to sound idiotic nearly every time they open their mouths, I advised them to say nothing and say it was their lawyer's advice. That's worked pretty well, and I haven't had to explain away any moronic statements. And we've had pretty good success attacking the news media and the county clerk, making it look like they're the ones to blame.

Quillen: What happens in the spring when the dogs are running all over? And what happens when people can't find a place to live and remember that their commissioners promised to do something about housing? What happens when county employees get fed up again?

Ziegler: Well, we've been trying to do something about housing—we've never turned down a Senate Bill 35 exemption—if you're rich, you don't have to worry, we'll help

you get that suburb going, and we'll do our best to make the building inspector go along with your ideas. And we've spent more time on dog control than any other board of commissioners. And we do have the personnel plan, and in a few years, we might know what's in it.

Quillen: Sounds like you've got your work cut out for you.

Ziegler: Ah, but I've been successful so far. The tide of public opinion is turning. The commissioners are coming across as able, energetic hard-working men being thwarted by a few shrill critics standing in the way of progress.

And besides that, people are starting to believe that I don't even exist. I'd say we're getting somewhere.

QUILL IN HAND

A MEETING OF THE UN-PERSONS
BY ED QUILLEN

Foolishly, I sat in the small bar with my back to the door, instead of to the wall, and I couldn't see who was coming in. But that didn't matter at the time; I was feeling quite pleased, for I had invented the drink that effectively combined the rough Old West with the flaky New West. It was a double shot of Old Overhold rye whiskey chased with a bottle of Perrier water.

Foolish as I may be, I am still blessed with quick reflexes, and when I felt the hand on my shoulder, I jumped up and whirled around, grabbing a bottle to cave in the skull of whoever had appeared.

"You're getting pretty jumpy these days, Quillen," he said, the broad grin revealing the even teeth. "Now you know how it feels."

It was none other than Ananias Ziegler, Lt. Col., USAF, ret., and he sat down, uninvited, and waited for me to respond.

"What do you mean, I know how it feels now. Are you talking about that rumor that I committed suicide last week?"

He ordered what I was having before replying. "It only seemed fair. Here were all these people running around saying that I don't exist, that the county commissioners didn't even have an effective public relations campaign, so I thought it was time you learned how it felt to be a non-person. How was it?"

"The first I heard of it," I told him, "was when the radio station called and Bill Murphy seemed shocked to hear my voice. You know, if that rumor had been true that I killed myself last Friday night, Murphy would have had an interview that would have made radio history. But I wasn't too worried. People who know me know I'm not that type."

"But a lot of people don't know you," he said, "and now you should have some sympathy for my position of being an un-person and trying to do a job." He downed the rye, made a face, and then started guzzling the Perrier.

"How is your work doing?"

He made a face. "If I could just get Welker to check with me before he makes statements. Damn, I want him to come across like a statesman. When he ran out of money to pay his lawyers, I wanted him to say he welcomed the chance to face the voters, that everyone knew he had a friend in the courthouse in Bob Welker. Instead, he does a lot of mud-slinging and innuendo, and sounds even worse than he really is."

"That is a problem," I agreed, "How are you going to handle Bob's campaign to stay in office?"

"Well, I was going to get Claude Penny to say that he'd had trouble with bureaucrats and their red tape, and that Bob had cut through that and helped out a citizen who just wanted to live in his own house. But now Penny is suing the board of commissioners, so I'm going to have to look around."

"Maybe you can get somebody from the Pet Assistance League."

"That'd be like getting somebody from the county road crews." He downed another double shot of Old Overshold,

neglecting to chase it. "I'll come up with something so Bob can hold office for another year—but in case I don't, you ought to see how you're going to get reamed in the resignation speech I'm writing.

"I can barely wait," I said, "What are you and Lane doing?"

He winced. "I haven't seen much of John. I think he's still working on the legal end of it, and hasn't been too concerned with public relations lately. My own idea is to quit fighting the petitions in court, and go out and campaign like hell against the news media."

"Why us," I asked, ordering another round and hoping that the bar chits would make it past Karen's scrutiny when I turned in my expense account, which is one of the few times I get paid for writing fiction.

"You guys in the news media," he said, "This is part of a national thing, you know. We've got the courts and half the public convinced you're a bunch of greedy vultures, exploiting human tragedy and in business solely to provide cheap thrills."

"Even if that were true," I said sadly, "that isn't as bad as public officials who abuse their public trust, or judges who don't want the public to know what they're doing. I don't buy all that buncombe that our own PR people put out about us being the public's watchdog."

"What is your attitude, then, Quillen?"

"People pay us to gather and distribute information. And when we're prevented from doing that, say by secret meetings or lies, half-truths and evasions, that means we can't serve those people who rely on us. It makes me mad as hell."

Ziegler winked at me. "I understand," he said quietly, "but I've got a job to do. I've got to crank up the campaign against the 'special interest' and you can be damn sure you're going to be one of them, and I've got to get out the mass mailings to persuade the voters that their newspaper, which, unlike a politician, certainly has nothing to gain by lying to them, is

somehow deceiving them by trying to tell them what the commissioners are doing."

"And then?"

He was walking out of the bar. He turned. "You'll see. Maybe I can come up with a better rumor next week."

I ordered more rye and chaser wishing I could see up Ziegler's sleeve. For some rough beast was lurking there, and Ziegler was going to turn it loose.

(10 minutes after this was written, a sheriff's deputy served the papers.)

THE MAIL'S OPINION

SIGN THE RECALL PETITIONS

John Lane and Bob Welker deserve to be recalled from their positions as county commissioners.

To recall a duly-elected official does not take any reason whatever. But these two have given plenty of reasons to county electors on why they should be removed.

One reason we see to recall them is because we can't afford to have them save the county any more money. Not if "saving" means spending countless thousands of dollars on road supervisors, new auditors, courthouse remodeling, computer systems and preventive maintenance programs.

Each of these programs is supposed to be saving taxpayers thousands of dollars. But rather than explain the issues as any savvy politician would do, these men have instead forced the measures down our throats.

There is a serious question of whether or not any money would be saved because the commissioners have not been able to put their ideas into any type of cohesive plan and present it for public inspection. To us Lane and Welker appear bent on bankrupting the county with their schemes, not bothering to take the time to explain their plans to people here.

It's like we didn't even matter.

They have their own ideas of where they want to take the county and it doesn't matter to them what people here think.

Lane and Welker evidently gave up long ago any pretense of running for reelection, choosing instead to chart their own course for the county "because only they know what is right for all of us."

Bless their hearts.

There's an old saying that the road to hell is paved with good intentions and the good intentions of Lane and Welker do not cut it.

There are other major issues. For one, "secret meetings." This covers an entire field including outright lies, double-talk, evasions and basic contempt for the public, evident with their total disregard for public opinion.

It boils down to a lack of open communication with the voters. As we said before, Lane and Welker would rather jam their ideas down our throats than get a consensus of opinion from the people before taking any controversial action.

The action to hire Lee Walker, at a salary out of all proportion to existing county scales, appears to be one of spite. They seem to be telling all of us what they think of our opinions. Walker's hiring, in the face of intense opposition and controversy, is an outright act of contempt toward Chaffee County's electorate.

They may as well be operating in a vacuum because it has become apparent that we can shout all we want and it will have the same effect: none.

Lane and Welker have not evidenced any concept of how a local government is operated, of the need for constant feedback from their constituents.

One last reason for recall we want to mention at this time is the deterioration of county government. Things on the mesa

are grinding to a halt. We don't know how much longer it will be before our county government collapses in total chaos.

Already there are signs of looming disaster as deed and title transactions are delayed because of the commissioners involvement in the clerk's office; morale and personnel problems among county employees; and the infighting among our elected officials.

There are only 13 months left before the next county election. But from what we've seen the last 11 months, the problems Lane and Welker are causing are multiplying exponentially with their continued stay in office.

We don't like the basic idea of a recall. It is expensive and time-consuming, a great drain on everyone involved.

But our situation has, unfortunately, reached the point of no return. Until Lane and Welker are jerked out of the commissioners' office, things will not improve with time. They will only get worse.

The sooner they are removed, the better.

THE MAIL'S OPINION

LANE AND WELKER ARE THE ISSUE

It appears nearly certain that County Commissioners John Lane and Bob Welker will face a recall election, and it is just as certain that they, or their supporters, will try to make an issue out of The Mountain Mail's coverage of the county commission.

We'd like to make some things clear before the charges start flying around.

First of all, there's the coverage of the meetings. We have never received a complaint from Lane or Welker that either was misquoted or taken out of context, or that any other error of fact occured in a news account of a commissioner's meeting.

Had such occured in the 11 months since they took office, they certainly would have complained before now. The fact

that they haven't complained earlier about the reporting of their meetings tells us something—that there hasn't been anything wrong with that coverage.

If they start complaining now, it's for an obvious reason—they're running scared and they're trying to blame The Mountain Mail for their problems.

But we report their public actions and words as accurately as humanly possible, and if the voters of this county are thus familiar with their actions and words, and decide whether Lane and Welker are fit to continue in office, that indicates we're doing our proper job—providing people with information so they can make decisions.

Our news coverage is as unbiased as possible. Our editorial page is biased. All editorial pages are, because they exist for the expression of opinion—the paper's, its writers, and those of readers.

As for our editorial philosophy, let's look back.

We endorsed John Lane last November, and we made a mistake. So did a lot of other people.

We did not endorse Bob Welker, but the county's other newspaper did. The accusations of prejudiced media begin to sound odd, especially if you remember that we supported the Republican opponents of both Jasper Cortese and John Hughes. And we have continually criticized President Carter for his attitude toward the West, and Carter is certainly not of the same party as Lane and Welker.

What are the other things we've heard?

Do we have a vendetta against Lane and Welker? No, we have a desire for honest, open and competent government, and we criticize people who stand in the way of that.

Lane took office with a tremendous reservoir of public goodwill, and that existed here as well. But not two days after he was sworn in, Lane lied to a Mail reporter, who asked him several times if the new commissioners were going to look over

the budget. "We'll call you if we do," Lane said, but he never called and never announced the secret budget sessions.

We don't like being lied to, and we don't think the public likes it either. That was the first of a series for Lane, climaxing the other night when he denied threatening a road crew member when three other people in the room had heard the threat and were ready to say so.

Welker's handling of things hasn't been any better—it's been worse, if possible. What about his promise of $2500 of county money for the Buena Vista centennial? Or the county dog-control program?

We could go on and on—they have provided an encyclopedia of poor government, from Welker's notion that the county should pave town streets to Lane's lies about the VASI lights to the shake-ups in the road department to the Calco route to the housing problems they said they would try to solve—but our point is simple. Those who deal with them on a regular basis have found them untrustworthy.

It wasn't The Mail that called Welker and Lane "a military dictatorship." It was Dick Tuttle, a man of their own party who had served on that board for 12 years.

It wasn't The Mail that organized a recall effort—it was a group of private citizens who were fed up with things at the courthouse. Certainly, we publicized those activities, just as we would if there really were a group organizing to support the commissioners—our job is providing information.

On the editorial page, we have commented, generally adversely, on their activities. But that is our right, and we've never hesitated to print an opinion blasting us and defending the commissioners. But that's one of our jobs, too—making available a public forum for the expression of opinion.

Some of our writers have used the tools of the writer's trade, satire, irony, parody, etc. in criticizing the commissioners. And Lane and Welker have gotten their word out—press

conferences, interviews, prepared statements, etc.—using the tools of the politician's craft. There's nothing wrong with either.

We have fought for open meetings, paying out legal fees, because that's one way we can serve the community—by trying to insure that public business is conducted publicly.

We have fought the lies, half-truths and evasions because we believe our readers have the right to know what their elected officials are doing with their money and in their name.

And we have endorsed a recall move because we have not seen either Lane or Welker move toward better government—every action indicates they plan more of the conduct that has wasted money, lied to people, caused voters to lose confidence in local government, and treated people with contempt and arrogance.

Our quarrel with them is not personal, nor has it anything to do with partisan politics. Instead, it concerns their attitude toward the people who put them in office; their refusal to listen to anyone except outside experts; and their maladministration of the county.

Those problems should be the issue in a recall election, not The Mountain Mail. We have nothing to apologize for in our coverage of the courthouse, and we have merely exercised our right to express opinions, and we have encouraged others to do so.

We have done our job and upheld our responsibilities to the community we're proud to serve.

Had Lane and Welker taken their responsibilities more seriously and honestly, they wouldn't be facing a recall election. They're the real issue, not the news media.

We hope voters will force Lane and Welker to explain their actions in office rather than allowing us or any other new medium to be a campaign issue. We're not the ones facing an

election—Lane and Welker are, and they had better do some explaining. They owe the public that much.

EK

THE MAIL'S OPINION

IT'S UP TO YOU IF THEY SHOULD STAY IN OFFICE

. . . . John Lane and Bob Welker have fought it, saying, among other things, that they want to continue their struggle to save money for county taxpayers.

That concern, however, was not in evidence when they tried to find a way to get their court appeal costs paid out of the public treasury.

And we hope that the court hearing will put the issue before the county's voters, who should make the decision.

Lane and Welker have been claiming lately that whatever faults they may have, they're running an efficient county government. Their idea of efficiency apparently is spending $4500 on an audit to find out $45 was missing from the sheriff's department five years ago.

They've been putting up smokescreens, trying to obscure the issues that led to the recall, and it is time to consider some of those again.

They did put through a budget which shows the inevitable spending increases for inflation without a significant tax increase. Their supporters point to this and say it is a noteworthy accomplishment.

It may be, but it has a price. They got the money to fund everything next year by cutting back on the amount of surplus the county carries over every winter until the next year's property tax payments come in.

This wasn't a bad idea, providing enough surplus remains to carry the county through, but it does mean that whatever board sits down a year from now to prepare a budget will either increase taxes or cut back county services.

It can't happen any other way. Doing what they did was a good trick for two commissioners fighting for their political lives, but it merely postpones the inevitable; it does not avoid it.

They point to a new auditing firm as some kind of panacea that will lead to increased governmental efficiency. We find it strange that the old auditor, Bob Marshall, was replaced just after he criticized the commissioners and the new firm has found fault with every office but the commissioners' office, following "research" that consisted of asking Lane and Welker.

And that gave Lane plenty of ammunition in his campaign to make it look like every other official in the county is incompetent or worse.

But the issue is not whether the clerk, assessor or treasurer are fit to continue in office. And the issue is not the spectre of people controlling county policies through the threat of recall, as Lane and Welker have been saying.

In that statement, they inadvertently hit the reason that people are ready to recall them. Their attitude seems to be that the people of this county should not have any say in or control of county government.

They have treated the public with contempt and arrogance, acting as if they know everything. They ignored the public on their computer plans, their initial dog-control program, the rubbish ordinance—nearly everything imaginable.

The real issue is whether the people of this county want this kind of government, and our belief is that the people should decide. It's not a decision for Lane and Welker to make, nor it is a decision for a newspaper to make.

It is up to the public. We have more respect for ourselves than to tolerate a continuation of the kind of government that

has been running rampant for the past year, and we pity those who have so little faith in themselves and their fellow citizens that they believe Lane and Welker are the best that can be found here.

THE MAIL'S OPINION

THEY MUST BE REMOVED FROM OFFICE

We have no doubt that County Commissioners John Lane and Bob Welker entered office with good intentions 15 months ago. But we all know which road is paved with good intentions, and the county will continue to slide down that road unless the two are removed from office at the recall election March 4.

Lane and Welker have not been an unmitigated disaster as county commissioners. They have tried to modernize certain county policies and procedures that needed to be brought up to date. They have gathered a cadre of supporters, some of them substantial members of the community.

But they have also lied to the public, engaged in secret meetings, and failed, through their refusal to engage in the dialogue with the public that is essential to representative government, to keep the confidence of the public. By losing that confidence they have lost their ability to govern effectively, whether or not the recall succeeds.

Recall is an extreme step. The process leading to it has caused a great deal of rancor and divisiveness in a community where all of us would rather be concerned with other matters.

Lane and Welker, though, have brought it upon themselves. They made promises about open meetings, and then continued to meet clandestinely. Members of the working press were certainly not the only ones to talk to the commissioners about their actions, their ways of doing things, their shooting from the hip on important issues. Numerous people, including leaders of their own party, have talked to them. Lane and Welker refused to heed that advice, and the recall is the result.

Their supporters, instead of sending out bulk-mail "explanatory" pamphlets, might ask themselves how things got so bad that a recall election is imminent—and the answer is not in our office, nor at the county road department, nor in any non-existent conspirators' meeting hall—it's in the commissioners' office at the courthouse.

AND WHAT ARE THEIR SUPPORTERS claiming for Lane and Welker?

Let's go through their most recent publication.

§ TAXES: They claim that Lane and Welker have acted responsibly concerning the county mill levy, reducing it by two mills in 1979 and keeping the increase this year to .3 mill.

This is true, and it would be commendable if it were the whole truth. But what happens next year?

Whatever happens, it won't be pleasant, because of their irresponsibility and desire to protect themselves today while disregarding the certain consequences. The commissioners (Ed Bradbury shares responsibility on this) took $500,000 out of the county's surplus carryover fund to make this year's general fund budget work. And even at that, they had to raise property taxes to almost the maximum increase allowed by state law.

There won't be a convenient $500,000 surplus next fall, when the board of commissioners has to draw up a budget. Either county programs will have to be cut drastically, or we will face extreme tax increases. The commissioners have left whoever will be in office next November with a terrible problem by their irresponsibility—we'd like to hear their supporters explain how what must happen in nine months speaks well of Lane and Welker.

§ WAGES: Their supporters claim that the commissioners have adjusted wage scales to meet cost-of-living increases. This is true. But has it diminished the costly turnover in county personnel? Why don't they show us some numbers?

We suspect that they don't have the figures. And have these salary increases gotten us better service from the county?

Just go to the county clerk's office and ask how far behind they are on recordings. They were up to date before Lane and Welker took office and cut back the clerk's staff. It shows you how concerned Lane and Welker are with serving the public that elected them, and it shows you just what their salary schemes have done for the citizens of this county: damned little.

§ PERSONNEL: Their supporters will tell you that the county has established policies on hiring and firing. "When a county job is open, and its qualifications are published, you can apply," they say.

When and where was Lee Walker's job published? And the supporters say that county employees can "rely on the continuity of their jobs without fear of politics."

Is that why Lane threatened to fire a road crewman whose wife was active in the recall movement?

§ INSURANCE: The commissioners have acted to get county property fully insured, and the bidding probably saved money. But was Bob Welker acting responsibly last summer when he moved that the board cancel all of its policies, on a moment's notice? Don't we have a right to expect a more reasoned approach from our elected officials when they're at work?

§ ROAD CREW MISUNDERSTANDINGS: Now it's just a misunderstanding. It was all along, and it was Lane and Welker who misunderstood how to do things. We don't find it strange that road crewmen would misunderstand a private meeting at the county dump.

We think the crewmen had a right to be confused when some county officers said Lee Walker was the county road superintendent and others said Laurence Campton was still in charge.

Walker, despite the circumstances of his hiring, appears to be doing a good job. And we'll give credit where it's due.

The problems in the road department may have ignited the recall, but they didn't make the movement. It goes beyond that, into every sector of the community. And anyone who tells you otherwise is lying.

As for the expensive and time-consuming litigation over petitions that were upheld by the district court, Lane and Welker instituted that litigation. They made it clear that they did not want to face the voters. It's time the voters showed them why those fears were justified.

§ ACCOUNTING: This is a complicated issue, but it appears that the new auditing firm is about as independent of the commissioners as Afghanistan is of the Soviet Union. The firm criticizes what the commissioners want criticized.

And the supporters act as though the audit discovered the lost interest on county funds in earlier years.

That issue was before the voters in the 1978 elections. Robert Barnes, the Republican candidate for treasurer, brought it out. We endorsed him for that reason.

But the voters made their decision. And Lane and Welker's supporters can't have it both ways. They can't say that Lane and Welker were put in office by the voters, and should not be recalled, while acting as though the voters were wrong when they reelected Hughes.

And there are so many things that even their supporters apparently don't like to talk about.

We don't hear anyone praising Welker's nonsensical dog-control program that resulted in Salida voters paying twice for a service that everyone else in the county only paid once for.

We don't hear them telling us how honest Lane is, after he admitted lying when he denied threatening a road crew member. Nor do they mention the other lies Lane has been caught in, including the Harriet Alexander Field controversies.

We don't hear anyone defending Lane's donation of adobe to a friend from the county landfill, in violation of federal regulations.

We don't hear anyone claiming that there haven't been secret meetings.

We don't hear anyone extolling Welker's knowledge of the law when he proposed that the county should pave streets inside an incorporated town.

We don't hear them saying that Lane made a masterful decision in sending heavy truck traffic past the hospital instead of his own house, a decision he made on his own without knowledge of the full board of commissioners.

The issue before us is whether these two men should stay in office.

Some people worry that if they are recalled, their replacements might be worse. While that is certainly possible, we have a hard time imagining how any future board could be.

Others worry that the threat of a recall will hamstring future commissioners. Well, that's why the law is on the books—so that we have a recourse when men are abusing the power the people have given them.

Others say that Lane and Welker have made mistakes, but those mistakes are not so bad that they shouldn't be allowed to stay in office. If Lane and Welker had learned anything from those mistakes, there might be some validity to that argument.

And, for those who would make this a partisan issue, or say that Lane and Welker's critics know little of county government, let us point out that Dick Tuttle, a long-time Republican and a man who served as commissioner for a dozen years, referred to Lane and Welker as a "military dictatorship."

We cannot find a reason why the citizens of Chaffee County should tolerate Lane and Welker in office for a moment longer than the law requires. They are an embarassment to all in-

formed citizens, a blemish in a beautiful place, and a cancer on local politics. If politicians have a bad name, it is because of the actions of men like Lane and Welker.

It's time they were returned to private life.

—MJB-EKQ

APPENDIX E

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 81CV40

AFFIDAVIT OF ARDYTH BROADRICK SOHN

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

ARDYTH BROADRICK SOHN, being first duly sworn upon oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I reside at 860 West Oak Court, Lewisville, Colorado, 80027.

3. I am currently an Assistant Professor of Journalism, at The University of Colorado. My teaching areas include: graduate research; public opinion, public affairs reporting; beginning reporting; mass media and society. I have been a Professor at the University since 1976.

4. My educational training includes: Ph.D. in Journalism-Mass Communications Research, 1976, Southern Illinois University; M.A. in Journalism, 1975, Southern Illinois University; and a B.A. in English, 1969, University of Illinois.

5. My work experience includes practical experience in the field of journalism as a reporter and assistant women's

editor for the Casper Star Tribune (Wyoming), 1971-1973. I also have experience teaching English, Laramie, Wyoming, 1970-71 and Freeport, Illinois, 1969-70.

6. At the hearing upon Motion for Change of Venue in the above captioned litigation, January 13, 1981, I was qualified to testify as an expert in the field of mass communications and the impact of media upon public opinion in small communities.

7. I have reviewed the following five articles written by Mr. Ed Quillen and published in *The Mountain Mail*.

a. "And now, a Secret Document from the County Files," May 4, 1979;

b. "How They'll Handle a Public-Relations Campaign," October 5, 1979;

c "Another Visit from Ananias Ziegler," November 8, 1979.

d. "And the Imaginary Figment Speaks Again," December 6, 1979;

e. "A Meeting of the Un-persons," January 18, 1980.

8. I have not conducted a survey in Salida, Colorado to determine how exactly the above articles were perceived by Chaffee County residents, but I have used conventional accepted social science research sources to develop a media profile of the community.

9. Salida and the Chaffee County Community can be termed a "closed media" community. *The Mountain Mail* is the primary source of local news in the community, being the only daily newspaper. It has a circulation of about 2,403 and the 1980 Preliminary U.S. Census Bureau Report shows a population of 4,878 or 2,147 households in Salida, indicating a high penetration by the newspaper.

10. *The Mountain Mail* subscribes to no national wire service, making it one of only two dailys in Colorado without such coverage (the other being a small daily business newspaper in Denver).

11. Other print media show minimal penetration in Salida and Chaffee County, providing very little or no counter information about the local market place. The only other locally generated news medium is an AM-FM radio station. Television coverage is non-locally generated.

12. In a closed media community the dominant news organ is likely to have significant influence on the setting of the local discussion agendas within the community.

13. Important local issues such as a recall of the highest elected officials in the County are likely to attract substantial citizen interest within a small mountain community.

14. Readers of printed news in a closed media community tend to have less opportunity to test or question what they read when media sources are limited.

15. Research has indicated that some readers may misunderstand such special newspaper writing as satire and not only miss the point but, in some cases, take the column literally.

17. There are generally accepted literary devices which would conspicuously and unavoidably announce the introduction of fiction in an editorial column, which include:

a. The express announcement in the article that it is fiction by captioning the article as "fiction" or "humor" or with a lead in paragraph such as "the story might have been written something like this. . . ".

b. The use of strictly fictional names, without reference to real persons.

c. The reference to physically impossible actions or feats.

d. The use of a format commonly used for fictional representation, such as a common joke format, cartoons, etc.

e. The reference to known fictional characters.

18. During my inspection of the above listed articles, I was unable to perceive in any one of the articles any of the above-listed conspicuous and unavoidable indicators of fiction.

19. It is possible for a reasonable person to perceive any one of the articles as literal truths, because of the above-mentioned media circumstances of the community and the known research about reader perception of newspaper content.

FURTHER AFFIANT SAYETH NOT.

DATED this 5th day of June, 1981.

Ardyth Broadrick Sohn
ARDYTH BROADRICK SOHN

STATE OF COLORADO)
) ss.
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 5th day of June, 1981, by ARDYTH BROADRICK SOHN.

Witness my hand and official seal.

My commission expires: May 31, 1985

G. R. PICHE'

Notary Public

APPENDIX F

Reservation Of Issues In Trial Court

(Mr. Kelley, for Respondent)

There is a Colorado case, DiLeo versus Koltnow, in which our Supreme Court has said that the case is saying that there is a greater burden at the summary stage applying in Colorado so that all the cases going the other way don't have meaning here, at least under the DiLeo case. But I don't think the Court has to worry about the burden on actual malice issue because we are dealing here with the issue whether the case is public opinion and that in Colorado, at least, is a pure question of law; does not involve a question of fact.

(Transcript of July 13, 1981, Hearing, p. 7)

* * *

(Mr. Piche' for Petitioner)

My understanding at least from the Pre-Trial Conference that, assuming that, the case continues, that we are going to be getting into malice and the factual issues at a later time.

THE COURT: Okay.

MR. PICHE': What we are presenting here today, as I understand it, is the issue of fact versus opinion and whether the matters alleged are imflammatory (defamatory).

THE COURT: I agree. I think counsel probably agrees with that.

MR. KELLEY: Yes.

THE COURT: Let me say it a little bit differently—.

MR. PICHE': (Interrupting) The depositions are here at the Court, and we arranged to have them sent down from Salida. I believe they are in the Clerk's office.

MR. KELLEY: I have cited a few pages from the plaintiff's deposition. I would be happy to send you copies of those pages.

THE COURT: I think what you are trying to do in this Motion, and you are both in agreement, is simply have the matters separated out, what is actionable as a matter of law and what is actionable and whether or not I read all these depositions is immaterial to the issues today.

Would that be fair?

MR. PICHE': Yes.

MR. KELLEY; Yes, only the matters cited in the Brief. (Transcript of July 13 1981, Hearing pp. 60-61)

APPENDIX G

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF BUTCH CASSIDY

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY,
a Colorado corporation, MERLE BARANCZYK
and ED QUILLEN,

Defendants.

BUTCH CASSIDY, being first duly sworn upon oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have resided in Buena Vista for almost two years and my current address is Box 1418, Buena Vista, Colorado 81211.

3. I am employed as a mechanic and manager of the Buena Vista Chevron Station.

4. My educational background includes formal schooling through high school and eleven years in the Army.

5. I do not subscribe to *The Mountain Mail* personally, but it is delivered every day at the service station where I work. I also read on a fairly regular basis *The Chaffee County Times* and *The Denver Post*.

6. I was new in town at the time of recall of the County Commissioners Lane and Welker. I was aware that this was a

very controversial issue. You overhear a lot of conversations when you're working at the gas pumps. As a newcomer in town who did not know the people involved, I thought *The Mountain Mail* newspaper accounts were very biased. I recall reading the articles written about the Commissioners' hiring a guy named Ananias Ziegler to do public relations work for the County. I can recall that I believed the story myself. Working at the gas pumps, I overheard many people in the community discussing the stories about Ziegler, and it was clear to me that other people in the community believed that the Commissioner had hired someone to do public relations work. Of course, as time went on and through conversations with other people, I became aware that Mr. Ziegler did not exist and that the Quillen stories were not true.

DATED this 2 day of June, 1981.

Butch Cassidy
BUTCH CASSIDY

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 2nd day of June, 1981, by BUTCH CASSIDY.

Witness my hand and official seal.

My commission expires: June 27, 1984

(SEAL)

Linda K. Grauer
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF GLADYS CROUCH

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY,
a Colorado corporation, MERLE BARANCZYK
and ED QUILLEN,

Defendants.

GLADYS CROUCH, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have lived in the Salida area for 4 years and currently reside at 33200 County Road 371, Buena Vista, Colorado 81211.

3. I read the articles written by Ed Quillen and published in The Mountain Mail concerning the County Commissioners' hiring of a public relations person named Ziegler. At the time I read these articles I believed that the writer was presenting statements of fact and the Commissioners had indeed hired

someone to do public relations for the County. I did not understand that Mr. Quillen was writing about a fictitious person.

DATED this 29th day of May, 1981.

Gladys Crouch
GLADYS CROUCH

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by GLADYS CROUCH.

Witness my hand and official seal.

My commission expires: June 25, 1983

(SEAL)

Edith Moe
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF GEORGE L. ENGEL

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

GEORGE L. ENGEL, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have resided in Salida for ten years and currently live at 237 Ouray, Salida, Colorado 81201.

3. I am now retired but formerly worked as an artist doing advertising work for a large drugstore in Iowa.

4. I am a graduate of the Maryland Institute for Promotion of the Fine and Practical Arts.

5. I am a regular subscriber to *The Mountain Mail*, occasionally get the Sunday *Denver Post*, occasionally read the *Pueblo Chieftain*, and I subscribe to *U.S. News & World Report*.

6. I read the articles in *The Mountain Mail* written by Ed Quillen about the County Commissioner John Lane hiring a Mr. Ziegler to do public relations work. At the time I first read the article, I believed it was factual. I did not read the article as

being satire at all. I thought the article was written in such a way that it was very real and very factual. It gave me no reason to believe it was not factual. It is true that I fell for it and not until I talked to other people in the community and read the later Ziegler articles did I get smart and realize that the information about Mr. Ziegler was not true and he did not exist.

DATED this 28th day of May, 1981.

George L. Engel
GEORGE L. ENGEL

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by GEORGE L. ENGEL.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piche'
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF RICHARD H. GRINDLE

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

RICHARD H. GRINDLE, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have lived in Buena Vista for seven years and currently reside at 27454 County Road 319, Buena Vista, Colorado 81211.

3. I am employed at the Buena Vista Correctional Facility as a Case Manager.

4. I have a B.S. degree from Metro State College in Denver.

5. I am a regular subscriber of *The Chaffee County Times* and do not regularly subscribe to *The Mountain Mail*.

6. I recall reading the articles written by Ed Quillen which discussed the County Commissioners' hiring of Ananias Ziegler to do public relations work for the County. While I was not a regular subscriber to *The Mountain Mail*, when an article caused a lot of talk in the community, I would make a point of

getting the paper and reading that article. The articles concerning Ananias Ziegler that I read had some kernels of factual matters in them. They left me with the impression that the Commissioners had hired a public relations person named Ananias Ziegler. However, by talking to my friends, I ascertained that statements in the articles about the public relations man which appeared to be fact in reality were not.

DATED this 29th day of May, 1981.

Richard H. Grindle
RICHARD H. GRINDLE

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by RICHARD H. GRINDLE.

Witness my hand and official seal.

My commission expires June 25, 1983.

(SEAL)

Edith Moe
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF JAMES L. HARTMAN

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

JAMES L. HARTMAN, being first duly sworn upon oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state to the best of my knowledge the statements contained herein are true.

2. I have lived in Salida for six years and currently reside at 203 Walnut, Salida, Colorado 81201.

3. I am self-employed as a mechanic and the owner of Jim's Transmission.

4. I am a high school graduate.

5. At all times pertinent to the articles discussed herein, I was a subscriber to *The Mountain Mail* and my wife and I read the newspaper on a daily basis.

6. I read the article written by Ed Quillen entitled "And Now a Secret Document From the County Files," and was led to believe that John Lane wrote the letter quoted in the article. However, I couldn't imagine that John Lane would do such a thing and I thought that if John wrote the letter he must have been joking. The letter was so disturbing that I took the letter

to John Lane and asked him if he wrote it. It was not until confronting John that I became aware that the article was fictitious and false.

7. At the time this article was written, a lot of people who came into my shop for service were talking about what they were reading in *The Mountain Mail* concerning the Commissioners; they were upset about the Commissioners' activities; and many people indicated they too had believed the article about the secret letter written by John Lane.

DATED this 28th day of May, 1981.

James L. Hartman
JAMES L. HARTMAN

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by JAMES L. HARTMAN.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piché
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF LELAND E. LEAK

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

LELAND E. LEAK, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I moved to Salida in October of 1971 and currently live at 8470 County Road 120, Salida, Colorado 81201.

3. I work as a Correctional Specialist at the Colorado State Reformatory.

4. I am a high school graduate with an A.A. degree in correctional administration.

5. I used to be a subscriber to *The Mountain Mail*, and I currently subscribe to the *Denver Post*.

6. I also run my own business, Leak Enterprises, engaged in the sales of business equipment.

7. I have been active in the Salida community and have served as the Commodore of the Fibark Boat Races.

8. I read several of the articles written by Ed Quillen about Ananias Ziegler being hired as the public relations man for the County. As I recall, it was the second or third article which I read first and read thoroughly. At the time I read it, I totally believed the article and thought that John Lane was hiring the wrong people. I thought John Lane was making some foolish errors, and I thought this person he had hired was not very smart to be running his mouth off to a newspaper reporter. Some time later, I saw John Lane on the street and I stopped him to inquire about hiring this public relations person. At that time John Lane told me the article was not true.

9. I felt misled by the article and felt like a sucker for believing that John Lane was hiring this person, so I went to *The Mountain Mail* and talked to Ed Quillen to explain that people like me were being misled and that I had believed his article to be a factual presentation.

10. I also discovered that the people riding to work in my carpool had believed these articles just as I had.

DATED this 29th day of May, 1981.

Leland E. Leak
LELAND E. LEAK

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by LELAND E. LEAK.

Witness my hand and official seal.

My commission expires: February 1, 1982.

(SEAL)

James L. ????
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF CHARLES L. MORUZZI

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

CHARLES L. MORUZZI, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have lived in Salida since 1972 and currently reside at 7349 County Road 111, Salida, Colorado 81201.

3. I have been retired since 1979; formerly I was self-employed as the owner of a mutual fund.

4. I am a graduate of the University of Denver with a B.A. in teaching and psychology.

5. At all times pertinent to the articles discussed herein, I was a subscriber to *The Mountain Mail* and read that newspaper on a regular basis.

6. I read *The Mountain Mail* article written by Ed Quillen entitled "And Now a Secret Document From the County Files," and believed that there actually was such a letter signed by John Lane as Supreme Commander because the article said this letter came from the files of the Courthouse.

7. I also read the articles written by Ed Quillen concerning the Commissioners' employment of a public relations man, a Mr. Ziegler. I was pretty mad at John Lane for hiring a public relations man for the amount of money stated in the article.

8. After reading several articles about the hiring of Mr. Ziegler, I called John Lane to ask him why he was doing these things. It was then I learned that the articles were false.

DATED this 29th day of May, 1981.

Charles L. Moruzzi
CHARLES L. MORUZZI

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by CHARLES L. MORUZZI.

Witness my hand and official seal.

My commission expires: June 25, 1981

(SEAL)

Ruth E. Spaulding
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF JOANETTE K. PADOVEN

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

JOANETTE K. PADOVEN being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have resided in Salida for 31 years. I am a homemaker and currently live at 421 East 4th Street, Salida, Colorado 81201.

3. I was a Republican precinct worker and campaigned to elect John Lane when he ran for County Commissioner in 1978. Many people in the community were aware of my support for Commissioner Lane both before and after the election.

4. During the recall campaign, the County Commissioners were a very controversial subject; everyone in the community was talking about them and what was being written about them in *The Mountain Mail*. On many occasions I was approached by people in the community, usually on the street, who knew that I supported John Lane, and was asked what I thought about Commissioner Lane hiring a person named Ziegler to do public relations work for the County. Those

people who approached me believed that the Quillen articles talking about Ananias Ziegler were true statements of fact. These particular persons did not realize, until I told them, that the articles were fiction or satire and that no such person existed. Even when I conveyed this information it was hard for them to accept—many people in this community trust the local newspaper and believe it wouldn't print something that wasn't true.

DATED this 28th day of May, 1981.

Joanette K. Padoven
JOANETTE K. PADOVEN

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by JOANETTE K. PADOVEN.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piché
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF JIM SCHNEIDER

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

JIM SCHNEIDER, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have lived in Salida three years, residing at 6820 Paradise Road, Salida, Colorado 81201.

3. I lease and operate the Spa Standard Station.

4. I am a high school graduate and have had two years of college education.

5. I am a subscriber to *The Mountain Mail* and I read the newspaper daily.

6. At the time of the recall election of the County Commissioners, I was new in town. I read the newspapers daily and I realized that the County Commissioners were controversial figures. I can recall reading the articles written by Ed Quillen about Commissioner Lane hiring an Ananias Ziegler to do public relations work for the County. I also remember that after reading some of these articles I was under the impression

that the County Commissioners had indeed hired a public relations person. Not until I talked to other people in the community did I realize that the articles about this public relations person were fiction.

DATED this 28th day of May, 1981.

James M. Schneider
JAMES M. SCHNEIDER

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by JIM SCHNEIDER.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piché
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF HARRY D. SCOTT

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

HARRY D. SCOTT, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I grew up in Salida, went to school here, moved away, and then moved back to Salida in 1976 after retiring. I currently reside at 506 Maxwell, Salida, Colorado 81201.

3. I was formerly employed as an electronics superintendent in the Air National Guard for 30 years.

4. My educational background includes 1-4 years of college and attendance at special electronics schools.

5. At all times pertinent to the newspaper articles described herein, I was a subscriber of *The Mountain Mail* and read that newspaper every day. I also subscribe to *The Denver Post*.

6. I read the article written by Ed Quillen entitled, "And Now a Secret Document from the County Files." I wondered why John Lane would write such a letter and thought to myself

that John must have been joking when he did this. The article was presented in such a way that there was nothing in it to make me believe it was fictional writing; therefore I believed that John Lane indeed wrote the letter that was quoted. The next day I took the article out to John Lane to ask him why he would do such a thing. At that time I was informed that the Quillen article was fiction.

DATED this 28th day of May, 1981.

Harry D. Scott
HARRY D. SCOTT

STATE OF COLORADO)
) SS:
COUNTY OF)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by HARRY D. SCOTT.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piché
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF HAROLD E. STARBUCK

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

HAROLD E. STARBUCK, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I am 38 years of age and was born and raised in Salida, Colorado. I currently reside at 7110 County Road 125, Salida, Colorado 81201.

3. I have been employed for 16 years as a wholesale dairy deliveryman for Meadow Gold Dairy.

4. I am a regular subscriber of *The Mountain Mail* and read this newspaper almost daily. I also subscribe to *The Denver Post*.

5. I remember reading the Ed Quillen article concerning the letter written and signed by the Supreme Commander, John Lane. I was very startled by this article because it didn't sound like John Lane to me, but there was nothing in the paper to indicate it wasn't true. I was led to believe that the story was true and the letter was actually written by John Lane. Later,

after talking to others in the community, I found out that the article was fiction and no such letter existed.

DATED this 29th day of May, 1981.

Harold E. Starbuck
HAROLD E. STARBUCK

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by HAROLD E. STARBUCK.

Witness my hand and official seal.

My commission expires: July 21, 1984

(SEAL)

Elaine C. Perea
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF ADA A. TURLEY

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY,
a Colorado corporation, MERLE BARANCZYK
and ED QUILLEN,

Defendants.

ADA A. TURLEY, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have lived in Salida for eight years and currently reside at 8244 County Road 104, Salida, Colorado 81201.

3. I am employed as the office manager for Salgas-Salida.

4. I am a high school graduate and have had a year of college study in accounting and business.

5. At the time of the articles described herein, I was a subscriber to *The Mountain Mail* and read the newspaper on a regular basis.

6. I read the article written by Ed Quillen about the Supreme Commander letter found in the County files and I read all the articles about the public relations person hired by the Commissioners named Ananias Ziegler.

7. My reaction upon reading these articles was to believe that the author was relating true stories, and I thought to

myself, "How could Commissioner Lane do such things?". Some time several weeks later, after reading several of the Ananias Ziegler articles, I finally discovered through conversations with other people in the community that the articles were fictitious.

DATED this 28th day of May, 1981.

Ada A. Turley
ADA A. TURLEY

STATE OF COLORADO)
) SS:
COUNTY OF)

The foregoing instrument was acknowledged before me this 28th day of May, 1981, by ADA A. TURLEY.

Witness my hand and official seal.

My commission expires: May 31, 1985

(SEAL)

G.R. Piché
Notary Public

DISTRICT COURT, COUNTY OF CHAFFEE,
STATE OF COLORADO

Civil Action No. 80CV40

AFFIDAVIT OF TEDDIE L. TURLEY

JOHN LANE,

Plaintiff,

v.

ARKANSAS VALLEY PUBLISHING COMPANY, a Colorado corporation, MERLE BARANCZYK and ED QUILLEN,

Defendants.

TEDDIE L. TURLEY, being first duly sworn under oath, states as follows:

1. I have reviewed the matters set forth in this Affidavit and state that to the best of my knowledge the statements contained herein are true.

2. I have been a resident of Salida for eight years and currently reside at 8244 County Road 104, Salida, Colorado 81201.

3. I am employed at the Colorado State Reformatory as a Correctional Supervisor, at Option Three (Maintenance Department) as a plumber.

4. At all times pertinent to the events described herein, I was a regular subscriber of *The Mountain Mail* and my wife and I read it on a regular basis.

5. I read the articles written by Ed Quillen about the Commissioners' hiring a public relations person named Ananias Ziegler. My wife and I discussed the articles at home and we believed that they were true statements of fact. I did not

know until after the recall election that the stories about this Mr. Ziegler were not true.

DATED this 29th day of May, 1981.

Teddie L. Turley
TEDDIE L. TURLEY

STATE OF COLORADO)
) SS:
COUNTY OF CHAFFEE)

The foregoing instrument was acknowledged before me this 29th day of May, 1981, by TEDDIE L. TURLEY.

Witness my hand and official seal.

My commission expires: July 21, 1984

(SEAL)

Elaine C. Perea
Notary Public

APPENDIX H

QUILLEN TRANSCRIPT

Q (MR. PICHE) Do you indicate in here, directly, at any point, that this character is fictional?

A (MR. QUILLEN) I think any reasonable person would presume that the character was fictional.

Q Why would they so presume?

A The element of satire, it's hyperbolic, it's—such a character could not really exist. Who on earth would name a child "Ananias"?

Q Do you think that that connection is widely known in this community?

A This community appears to be a religious community where—

Q My question is, do you think that is widely known in that context?

A I think so.

Q Okay. And has anybody asked you, at any time, whether this person actually existed or not?

A One one occasion, yes, sir.

Q And who asked you that?

A Leland Leek.

Q Who is he?

A He works up at the State Reformitory. His wife works in our office, Supply Department. He came in one day and asked, "Where can I find this Ananias Ziegler?"

I thought he was pulling my leg and joked with him, and then it became apparent that he did think there was an Ananias Ziegler. I told him it was just a figment of my imagination.

Q What did he say after that?

A He said something like, "Oh, how could you do that?"

Q And your response was?

A He left. It was on his way out the door.

Q So it wasn't apparent to him. Do you recall when—Strike that.

Do you recall when he stated that?

A I think it was sometime in November.

Q Of 1979?

A Right.

Q You continued writing Ziegler articles after that, did you not?

A Yes, I did.

Office - Supreme Court, U.S.
FILED
MAY 29 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1528

In the Supreme Court of the United States

OCTOBER TERM, 1983

JOHN LANE, PETITIONER

v.

ARKANSAS VALLEY PUBLISHING CO.,
MERLE BARANCZYK and ED QUILLEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

THOMAS B. KELLEY*

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1660 Wynkoop Street
Suite 900
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**Counsel of Record*

PANDICK MIDWEST INC. • 454-7600

QUESTIONS PRESENTED

This is a libel action brought by a Colorado politician against a local publisher and its editorial staff, based on editorials and satirical writings criticizing the politician's performance of official duty. The plaintiff completed discovery of defendants and their sources of information. Defendants thereupon moved for summary judgment, which the trial court granted. The Colorado Court of Appeals affirmed. It concluded that plaintiff had not made a *prima facie* showing that, as a matter of fact, the challenged materials were false, or that, as a matter of state law, they were anything other than privileged opinions. In addition, the Court of Appeals affirmed the trial judge's finding that plaintiff had not raised a material factual issue concerning malice or reckless conduct, and that defendants had both acted reasonably and conducted an adequate investigation before publishing the challenged materials. The questions presented are as follows:

1. Whether the Court of Appeals correctly applied Colorado Rule of Civil Procedure 56(c) and the Colorado Supreme Court's decision in *DiLeo* v. *Koltnow*, 613 P.2d 318 (1980), when it affirmed the grant of summary judgment based on plaintiff's failure to raise a *prima facie* factual issue requiring trial.

2. Whether the Court of Appeals correctly applied the decision of the Colorado Supreme Court in *Burns* v. *McGraw-Hill Broadcasting Co.*, 659 P.2d 1351 (1983), when it concluded that, based on the text and context of the challenged publications, the publications constituted opinions that are privileged under state law.

STATEMENT PURSUANT TO RULE 28.1

Respondent Arkansas Valley Publishing Co. has no parent company, subsidiaries or affiliates.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-1528

JOHN LANE, PETITIONER

v.

ARKANSAS VALLEY PUBLISHING CO.,
MERLE BARANCZYK and ED QUILLEN

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF COLORADO

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals of the State of Colorado (Pet. App. 10a-19a) is reported at 675 P.2d 747 (Colo. App. 1983).

JURISDICTION

The judgment of the Court of Appeals was entered on May 5, 1983. On December 19, 1983, the Supreme Court of the State of Colorado denied a petition for certiorari (Pet. App.

20a-21a). The petition for a writ of certiorari was filed in this Court on March 15, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT

1. Petitioner John Lane ("plaintiff") sued respondents Merle Baranczyk, Ed Quillen, and Arkansas Valley Publishing Co. ("defendants") for compensatory and punitive damages which allegedly resulted from publication of eleven editorials and opinion columns. These were published over a period of approximately ten months in *The Mountain Mail,* a small intermountain newspaper published five days per week in Salida, Chaffee County, Colorado. In these publications, defendants commented upon plaintiff's performance as an elected county commissioner.

Plaintiff took office as county commissioner in November 1978. During the summer of 1979, plaintiff became the subject of a campaign to recall him from office, initiated and sponsored by a group of county employees. Plaintiff was removed from office in a recall election held in March 1980.

During 1979 and until the election in 1980, defendants published news articles which provided complete coverage of all significant events and issues that arose during plaintiff's tenure (R. Part I, p. 43), including each weekly meeting of the county commissioners and all of the issues which arose during the recall process *(ibid.)*.[1] Within this period of time, at least 175 news articles were published concerning plaintiff, and the news coverage so presented was balanced, factual, and objective (*id.* at p. 44). Not one of these articles was challenged in plaintiff's libel action.

[1] Beginning in July 1979, defendants permitted plaintiff to publish in *The Mountain Mail* his own column setting forth his views concerning pending and potential issues facing the county commissioners (R. Part I, p. 44; see, *e.g.*, Exhibits I-5, L-1, and N-1) ("R." refers to the record in the trial court).

The opinion columns challenged in plaintiff's libel action included satirical writings by defendant Quillen, which reflected a style and technique which he used frequently. In the first of these writings (Pet. App. 22a-24a), the author presented the text of an obviously fictional letter purportedly written by plaintiff to county employees concerning a new personnel code which had been introduced by plaintiff and adopted by the county. The letter humorously referred to the code as a new "command structure," and also referred to one of plaintiff's fellow commissioners, who had retired from the Navy, as "Admiral Welker." The letter purported to advise county employees that henceforth "your daily routine . . . will begin with roll call at 0600 hours and end with taps at 2200 hours," and that:

> "this code is not as harsh as the rumors have had it. Violations will be handled at lower levels with company- and field-grade Article 15 proceedings, and only in severe or flagrant cases will a court-martial be necessary."

The letter was signed "John Lane, Supreme Commander." Through this fanciful and satirical device, Quillen poked fun at plaintiff's well known military background.

The other satirical writings involved fictitious dialogues between defendant Quillen and "Ananias Ziegler," an imaginary character who was described as a "new county employee" retained by plaintiff and another commissioner to improve their public images (Pet. App. 32a-44a). Quillen stated that he found Ziegler's job so "interesting" that he decided "[he] would share the conversation with both readers of this column," and then set forth a purported transcript of the discussion. Ziegler described himself as a former Air Force public information officer who was "in charge of inflating body counts [during the Vietnam war], sending out home town press releases, and making sure the commanding officer looked good." Ziegler also suggested, as indicated by his name, that he was a former Press Secretary with the Nixon White House.

In a series of absurd exchanges, Ziegler discussed with Quillen his strategy for improving plaintiff's image and defeating the recall (Pet. App. 33a):

> "Quillen: What's your strategy going to be on the recall drive?
>
> Ziegler: Oh, pretty simple. First, I'll tell them to pretend like it isn't happening, that it doesn't exist.
>
> Quillen: And then?
>
> Ziegler: Well, then they'll make the usual statements that it represents only a small group of disgruntled radicals who do not represent the feelings of the hard working, decent and law-abiding people of the community."

These satires showed on their face that they were whimsical pieces, some stating expressly that they were an "imaginary figment," written by a "hard working satirist" who covered a "meeting of the un-persons," and who interviewed the improbable deep throat named "Ananias Ziegler" (Pet. App. 38a-44a).

These satirical columns, like all the other publications involved in this case, made reference to actual controversies under discussion in the county. Like the other publications, the opinions so expressed were based upon facts which were accurately stated or implied in the columns, or which were the subject of contemporaneous news reporting and public discussion that provided the assumed facts which formed the basis of the opinions.[2]

2. On April 29, 1981, defendants moved the trial judge for summary judgment in their favor. In the alternative, defendants requested a partial adjudication determining which, if

---

[2] As one typical example, Ziegler referred (Pet. App. 34a) to intense public controversies concerning the commissioner's recent contracts and hirings, the facts of which were truthfully and prominently reported in local news coverage. These included a dog control officer, who was hired after she

(footnote continued)

any, of the allegedly defamatory statements constituted "actionable statements of fact" (R. Part I, p. 15). That motion was supported by a voluminous discovery record and affidavits. Defendants also filed a brief which contained an exhaustive analysis of the record, with citations to the depositions, affidavits, and exhibits, all of which demonstrated that each challenged statement "was an opinion with a factual basis" (Pet. App. 11a). The moving papers focused upon undisputed facts which demonstrated the following as to the factual basis and context of the challenged editorials and opinion columns:

First, all of the editorials at issue were preceded or accompanied by news articles which reported the facts underlying the issues discussed in the editorials. Those articles all were submitted as exhibits (R. Part V, Exhibits I-1 through V-22).

Second, the facts stated in the articles were reported accurately (R. Part V, affidavit, ¶ 3). This, together with deposition testimony, established that the material facts recited in, referred to, or otherwise indicated by the editorials and opinion columns were true (R. Vol. I, pp. 30-42).

(footnote continues)

had worked with the commissioners on the drafting of her own proposal for county animal control (Exhibit Q-3; R. Part II, 249-251), a computer programmer who was promised a contract in the event the county purchased a computer (Exhibit L-3; R. Part II, 247-249), and a maintenance inspector (a retired Air Force officer) who also was hired under a negotiated contract (again without soliciting applications from the public) (Exhibits N-2, N-3, R. Part II, 251-253). The latter two incidents involved special contracts which departed from procedures prescribed by the commissioners (including public advertising of the positions and selection among applicants by a hiring board) and negotiations which occurred in private sessions. At the time the columns were published, the most controversial issue debated in the county was the hiring and subsequent promotion to the position of county road supervisor—at a salary out of proportion to that of other county employees—of an individual who recently had retired from a local mining company (R. Part II, 258, 365). These decisions were made in private meetings without public notice or comment, and in the face of intense opposition (Exhibits N-4, N-5, N-6, N-7, and N-8).

Third, prior to the publication of the satirical columns written by defendant Quillen (Pet. App. 22a-24a, 32a-44a), Quillen had established in the community a recognized pattern of using that satirical style of writing (Exhibits V-1 through V-22).

Fourth, throughout plaintiff's tenure as county commissioner, his conduct in office inspired intense political controversy and harsh debate in which colorful, vitriolic rhetoric frequently was utilized (Exhibits I through U). This was reflected not only in the opinion columns of defendants, but also in guest columns, letters to the editor for which *The Mountain Mail* provided an open forum, and reports of debates at commissioners' meetings (*e.g.*, Exhibits U-4 through U-7, U-12, U-14, U-28, U-29, and U-32).

On June 9, 1981, plaintiff served papers in opposition to defendants' motion for summary judgment in which, as the court of appeals explained, he ". . . did not refute the factual basis" for the editorials as established by defendants (Pet. App. 12a). Moreover, at the hearing held on July 13, 1981 on the motion for summary judgment, defendants "addressed each article and demonstrated that the facts contained therein had been the subject of prior news articles, the truth of which was not disputed" (*ibid.*).

After argument, the trial court asked whether it would be necessary to review depositions. Counsel for plaintiff responded "[m]y understanding [is] . . . that we are going to get into malice and the factual issues at a later time" (Tr. 60); he added that "what we are presenting here today, as I understand it, is the issue of fact versus opinion and whether the matters alleged are [def]amatory" (*id.* at 61). Counsel for defendants replied that it *would be necessary* for the court to review the depositions with respect to matters "cited in my brief and yours too for that matter" (*id.* at 60; see also Pet. App. 63a).

On September 23, 1981, the trial court granted defendants' motion for summary judgment. The trial judge expressly made the following findings and conclusions (Pet. App. 6a-8a): (1) that plaintiff is a "public figure;" (2) that the humorous publications were "obvious satire," much of which was supported by fact and the rest was "rhetorical hyperbole" typical of political campaigns; (3) that these publications fell into the category of protected "opinions" under Colorado law; (4) that plaintiff failed to present any evidence, even circumstantial evidence, that defendants acted with malice or with reckless disregard for the truth; (5) that all of the record materials showed that defendants "conducted a reasonable investigation of facts from reliable sources prior to publication" to confirm the truthfulness of their factual information; and (6) that plaintiff failed to raise any "genuine issue" of fact, as required under Colorado Rule of Civil Procedure 56(c), which would preclude summary judgment.

After announcing his decision, the trial judge offered to further hear the issues if plaintiff so desired. Plaintiff elected not to do so and appealed. Plaintiff has never attempted to show in the trial court, the Court of Appeals, the Colorado Supreme Court, or this Court, that he possesses or could offer any material evidence not already contained in the record.

3. On May 5, 1983, the Court of Appeals affirmed the judgment of the trial court (Pet. App. 10a-19a). With respect to plaintiff's attempt to limit the issues at the summary judgment hearing, the Court noted (Pet. App. 13a): "Both parties' trial court briefs addressed the full range of issues." The Court of Appeals also explained (*ibid.*) that:

> "the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether defendants acted with reckless disregard of whether they were false or not."

Applying a Colorado Supreme Court decision construing state law, the Court of Appeals held that the trial court "did not err in basing its ruling on the briefs and supporting materials in the court's file." *Ibid.*

With respect to the "opinion" issue, the Court of Appeals held as a matter of state law that the satirical writings and most of the editorials contained mere statements of opinion, and that the facts upon which the opinions were based were fully disclosed and not distorted or misrepresented. Applying past Colorado cases, the Court concluded that, in context, the opinions reflected merely the "fiery rhetoric" and "hyperbole" typical of hotly contested political campaigns and were not actionable under Colorado law (Pet. App. 17a-18a).

With respect to the editorials which contained factual assertions, the Court of Appeals agreed with the trial judge that plaintiff had failed to raise a "genuine issue of fact" or a "prima facie case" which would survive a motion for summary judgment. The court observed that the contested assertions were factually correct and that defendants had made an unrebutted demonstration that they undertook a "reasonable investigation" before publishing the articles (Pet. App. 18a). Applying the controlling decision of the Colorado Supreme Court in *DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318 (1980), the Court of Appeals ruled that plaintiff was not entitled to rest on bare allegations in his complaint in face of specific factual proof of truthfulness and reasonable care. Hence, it was the burden of plaintiff to come forward with specific evidence that would necessitate a trial—a burden which he failed to sustain.

4. On December 19, 1983, the Colorado Supreme Court denied plaintiff's petition for a writ of certiorari (Pet. App. 20a-21a).

REASONS FOR DENYING THE PETITION

I.

As his first ground for granting the petition (Pet. 4-6), plaintiff contends that he was denied due process of law under the Fourteenth Amendment by not being given adequate notice and an opportunity to be heard in connection with the determination of the issues of truth and malice. However, his characterization of the decision-making process is not supported by the record.

Plaintiff had ample notice and opportunity to be heard on the issues determined by the trial court and the Court of Appeals. Defendants' motion for summary judgment and supporting papers established that the facts which were stated in, referred to, or otherwise indicated by the challenged publications were all true. In addition, defendants' exhibits established the context of the publications. Plaintiff did not attempt to controvert any of the facts so established, as required by Colorado Rule of Civil Procedure 56(e). Plaintiff now declares that he was led to believe that the trial court would not consider factual matters outside of the pleadings in ruling upon the motion. There is no merit to this contention.

Defendants' moving papers painstakingly established numerous facts extraneous to the pleadings. Defendants' purpose in establishing these matters was readily apparent. To demonstrate the absence of "actionable statements of fact," it was necessary to show the context of the publications and the truth of the facts stated, referred to, or assumed as the basis for the opinions expressed. Yet, plaintiff totally ignored these matters until the date of the summary judgment hearing.[3]

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[3] Plaintiff focuses upon language in defendants' motion which requested "a favorable determination of this litigation on the grounds that the statements complained of as libel are constitutionally privileged as opinion and political rhetoric" (Pet. 5). However, defendants' accompanying summary

(footnote continued)

At the July 13 hearing, plaintiff attempted to limit defendants' motion to legal issues framed by the pleadings. However, defense counsel unequivocally stated that all of the factual matters cited in the briefs must be considered in support of the motion.

While it is true that the parties expected to address the issue of "malice" in greater detail in separate briefs at a later time, this did not limit the discretion of the trial judge to reach all of the issues raised by the record before him. As the Court of Appeals explained (Pet. App. 13a):

> "Both parties' trial court briefs addressed the full range of issues despite the limited scope of the hearing, and the court did not err in basing its ruling on the briefs and supporting materials in the court's file. In a different setting the Supreme Court stated:
>
> > 'Defendant urges that this question of law cannot be determined until the court is apprised of all the facts. However *on the facts submitted* if the question of law is capable of determination the decision should not be withheld because of a claim of other facts, not disclosed, which might result in a different determination .... It is apparent from the matters that were before the court that a different result would not have been obtained had the president of the company been called as a witness to testify on the issue .... *Norton v. Dartmouth Skis, Inc.*, 147 Colo. 436, 364 P.2d 866 (1961).' (emphasis in original).

(footnote continues)

judgment brief, which was incorporated in the motion, not only deals exhaustively with the issue of truth, but also raises the "actual malice" requirement in libel actions (Brief in Support of Summary Judgment, pp. 1, 3). Plaintiff's opposition brief also set forth his contentions on the issue of defendants' state of mind (Brief in Opposition to Summary Judgment, pp. 23-24).

> Here, the matters before the court were sufficient to inform it whether the articles implied the assertion of undisclosed facts and, where there was an issue as to truth or falsity of those facts, whether defendants acted with reckless disregard of whether they were false or not."

In the present case, the "matters before the court" included extensive depositions which plaintiff had taken of defendants and the persons upon whom defendants relied as sources for their publications.

After the decision of the trial court, plaintiff declined the opportunity to have the matter resubmitted or to tender additional evidence and argument. Moreover, plaintiff has never suggested what evidence might be adduced in addition to the evidence already in the record which would affect the determination of the malice issue.

Hence, even if plaintiff actually was surprised by the scope of the trial judge's ruling, the Court of Appeals correctly found that any error was harmless. The record not only demonstrated conclusively the absence of any reckless falsity, but also that discovery was so complete as to make it apparent that a different result would not have been reached if further briefing had been entertained.

II.

Plaintiff also urges (Pet. 6-8) that the procedure employed by Colorado courts in resolving motions for summary judgment is based upon a misapplication of the First Amendment. To the contrary, however, the procedure employed by the Colorado courts is based upon their own procedural rules and substantive standards which derive from Article II, Section 10 of the Constitution of Colorado.[4] Thus, the argument raised by plaintiff turns on state law, and no federal issue is presented.

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[4] The text of Article II, Section 10 of the Constitution of the State of Colorado appears in the Appendix to this brief.

The Colorado law of defamation is founded upon principles once embraced by three members of this Court in *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29 (1971), but since rejected by a majority in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974). The *Rosenbloom* plurality opinion would have extended the rule of *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), to all matters of general concern, regardless of whether the plaintiff was a public official or public figure. The *Rosenbloom* opinion also stressed (403 U.S. at 55) the requirement that the evidence in such cases satisfy:

> "the constitutional standard with the convincing clarity necessary to raise a jury question whether the defamatory falsehoods were broadcast with knowledge that they were false or with reckless disregard of whether they were false or not."

In *Gertz*, this Court gave further consideration to the limitations on actions for defamation of private individuals as opposed to public officials or public figures. The Court held, *inter alia*, that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." 418 U.S. at 347. The Court's opinion leaves no room to doubt that the States are free to adopt standards providing for greater protection of the media than required by the First Amendment.

In *Walker* v. *Colorado Springs Sun, Inc.*, 188 Colo. 86, 538 P.2d 450 (1975), *cert. denied*, 423 U.S. 1025 (1975), the Colorado Supreme Court prescribed the state law standards which would apply to libel actions by private individuals, as authorized by this Court in *Gertz*. The *Walker* court acknowledged that *Gertz* " appears to disapprove of the rule stated . . . in *Rosenbloom*," and "appears to favor a simple negligence standard in cases not involving a public official or public figure." 538 P.2d at 456. Nonetheless, on the basis of its own assessment of competing policy considerations, the Colorado

Supreme Court adopted the reasoning of the plurality opinion in *Rosenbloom*. 538 P.2d at 457. Significantly, the Court also adopted that aspect of the *Rosenbloom* plurality opinion which requires that, with respect to "First Amendment questions of constitutional fact," liability must be based on evidence of "convincing clarity." 538 P.2d at 459.

Thereafter, in 1980 the Colorado Supreme Court decided *DiLeo* v. *Koltnow*, 200 Colo. 119, 613 P.2d 318, the case which prescribed the summary judgment standard followed by the Court of Appeals in the instant case. *DiLeo* was a libel case brought by a public figure, which the trial court had dismissed under Colorado's summary judgment procedure for lack of proof of a knowing or reckless falsity. The Colorado Supreme Court affirmed, and explicated the standard to be applied by trial courts in ruling on summary judgment motions in libel cases. The court reaffirmed the requirement that "actual malice" be established with "convincing clarity" (613 P.2d at 323). The court then adopted the definition of "clear and convincing evidence" which had been developed in Colorado under common law. 613 P.2d at 323. The Court explained how this standard of proof was to be applied under Colorado Rule 56, which permits summary judgment only when there is no genuine issue of material fact (*ibid.*):

> "In ruling upon the presence of a genuine issue of fact as to the existence of actual malice the trial judge must decide whether: 'the plaintiff has offered evidence of a *sufficient quantum to establish a prima facie case*, and the offered evidence *can be equated with the standard or test of 'convincing clarity'*. . . ." (Emphasis in original).

Two years later, in *Diversified Management, Inc.* v. *The Denver Post, Inc.*, 653 P.2d 1103 (Colo. 1982), the Colorado Supreme Court reaffirmed the requirement of clear and convincing evidence. The Court rejected the argument that the Colorado General Assembly had overridden that standard of proof. In so ruling, the Court emphasized that the requirement

of proof with convincing clarity rested upon the Court's interpretation of Article II, Section 10 of the Constitution of Colorado (653 P.2d at 1109; emphasis supplied):

> "When we adopted the *Rosenbloom* standard in *Walker*, we held that 'liability must be supported with convincing clarity,' 188 Colo. at 101, 538 P.2d at 459, and in *DiLeo* v. *Koltnow, supra,* we equated 'convincing clarity' with 'clear and convincing.' That our decision in *Walker* was based upon constitutional concerns is apparent from the fact that we rejected a simple negligence rule, permitted under *Gertz,* because we felt it would cast a 'chilling effect upon the news media . . .' 188 Colo. at 99, 538 P.2d at 458. *Because our decision was based upon our interpretation of article II, section 10, of the Colorado Constitution, the clear and convincing standard established in Walker supersedes the statute."*

Together, these cases demonstrate that the *DiLeo* summary judgment standard applied by the Colorado Court of Appeals in the present case was derived directly from the Colorado Supreme Court's interpretation of the substantive requirements of the Colorado Constitution in defamation cases and Colorado's own procedural rule governing summary judgment motions (Colorado Rule of Civil Procedure 56). Both the substantive standard and the procedural rule were adopted in Colorado without compulsion emanating from the First Amendment.[5]

Plaintiff also argues that some state courts are granting summary judgment too freely in defamation cases. He places reliance upon a generalized dictum in *Hutchinson* v. *Proxmire,* 443 U.S. 111, 120 n.9 (1979) (Pet. 7-8). However, plaintiff is presenting his arguments to the wrong Court. The dictum in

[5] The substantive standards in question were developed in the context of actions brought by private individuals. Of course, nothing less than these standards would govern cases brought by public officials.

Hutchinson was addressed to federal courts applying the Federal Rules of Civil Procedure. This Court has no similar supervisory role with respect to the "diversity of standards" in state jurisdictions (Pet. 8). The states are free to develop summary judgment standards of their own pursuant to their own laws.[6] Applying its own constitution and rules of civil procedure, Colorado has chosen to do so with full awareness of the *Hutchinson* dictum.[7]

Finally, and most fundamentally, the result in this case does not depend upon any special approach to summary judgment in defamation cases. Although plaintiff asserts (Pet. 6) that the state court's decision will provide "complete immunity from liability for defamation," the simple fact is that the Court of Appeals rendered its decision on the ground that *plaintiff failed to present any evidence from which a finding of falsity or malice could be made.* There is nothing in that determination which warrants review by this Court. The deficiency in this case was a factual deficiency that would have been fatal in *any* court, state or federal, under *any* summary judgment standard. Even though malice is a "state of mind issue," there never is a need for a jury trial if the discovery record shows no falsity, a thorough and reasonable investigation, and no evidence of recklessness.

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[6] See, *e.g.*, *Karaduman* v. *Newsday, Inc.*, 51 N.Y.2d 531, 416 N.E.2d 557, 563 (N.Y. 1980): "[Q]uestions concerning the sufficiency of a party's submissions to defeat a motion for summary judgment are principally a matter of State procedural law, and the analysis which the Supreme Court may use in denying a motion for summary judgment under the Federal Rules of Civil Procedure may differ substantially from the analysis that we would use under our own procedural statutes." *Accord*, *Brophy* v. *Philadelphia Newspapers, Inc.*, 281 Pa. 588, 422 A.2d 625, 637 (Pa. 1980) (concurring opinion discussing summary judgment standards): "We are always able to permit greater freedom in this Commonwealth than do the federal courts."

[7] *DiLeo* was decided one year after *Hutchinson*, and *Hutchinson* was cited to the Colorado Supreme Court in the briefs filed by the parties. The Court gave full consideration to the issues reflected in the *Hutchinson* dictum. 613 P.2d at 322-323.

III.

As his final ground for granting the petition, plaintiff attacks the Court of Appeals' application of the opinion privilege (Pet. 8-13). Plaintiff attempts to frame the question in terms of whether this Court's decisions, as reflected by the *Restatement (Second) of Torts*, § 566 (1977), have eclipsed the common law fair comment privilege (Pet. 8). See also *Miskowsky* v. *Oklahoma Publishing Co., cert. denied*, 459 U.S. 923 (1982) (Rehnquist, J., dissenting), *reh'g. denied*, 459 U.S. 1059 (1982). However, the holding of the Colorado Court of Appeals goes no further than to apply principles recognized in Colorado under the common law doctrine of fair comment, and does not require further support from decisions of this Court or the American Law Institute revisions to the *Restatement of Torts*.

Under the traditional common law doctrine of fair comment, the privilege for an opinion is lost when the facts upon which it is based neither are set forth truthfully nor "otherwise known or available to the recipient as a member of the public." *Restatement of Torts*, § 606 (1938). The pertinent change wrought by the 1977 revisions to the *Restatement* is that the privilege for an opinion as such is never lost, and the communication is actionable only on the basis of the falsity and defamatory character of facts, if any, which are fairly stated or implied as the basis of the opinion. *Restatement (Second) of Torts*, § 566, comment f at 177 and § 581A, comment c at 236 (1977). *See* Hill, *Defamation and Privacy Under the First Amendment*, 76 Colum. L. Rev. 1205, 1227-1251 (1976).[8]

The Court of Appeals' decision rests upon an application of the traditional common law of fair comment as recognized before the *Restatement* revisions. The court specifically found

[8] The common law fair comment privilege also requires that comment concerning a public office holder concern his public conduct. *Restatement of Torts* § 607 (1938). That condition clearly is fulfilled in this case.

that defendants "demonstrate[d] that each [statement in issue] was an opinion with a factual basis" and that such factual basis "had been the subject of prior news articles, the truth of which was not disputed" (Pet. App. 11a-12a). As to the articles containing opinions, the court found that each either truthfully stated the factual basis for the opinion, or alluded to a factual controversy which was part of plaintiff's record as a public officer, which was reported accurately in contemporaneous news coverage, and which was based upon facts "available to the recipient[s] as . . . member[s] of the general public." *Restatement of Torts*, § 606; *Hill, supra*, 76 Colum. L. Rev. at 1231-1232.[9]

Plaintiff makes three separate arguments with respect to the opinion issue. First, he contends that the Court of Appeals improperly recognized a privilege to comment upon facts which already have been placed in the public domain by way of prior newspaper publicity and otherwise; second, that the Court of Appeals' holding recognizes, under the guise of the opinion privilege, that imputations of defamatory fact made during an election contest are absolutely privileged; and third, that the trial court erred in determining that the fiction and satire here at issue could not reasonably be perceived as a statement of fact.

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[9] Addressing the publications individually, the Court of Appeals found that the May 4, 1979 "Supreme Commander" letter was an opinion and that "the factual basis for the opinion is disclosed in the article" (Pet. App. 16a). As to the four "Ananias Ziegler" articles, the court found that to the extent that they could be understood as other than pure fiction and fantasy, the facts alluded to had "been the subject of news articles" the truth of which was not disputed (*id.* 17a). As to the editorials dated November 30, 1979 and February 15, 1980, the court found that the publications contained the facts upon which the comments were based, and that there was "no charge that the facts are false" (*id.* 17a-18a). Finally, the court found that while the balance of the editorials contained statements of fact, the defendants had "submitted excerpts from depositions and news articles demonstrating the factual basis for the editorials" and that plaintiff was "unable to show in response that the factual bases were false" (Pet. App. 18a).

Defendants will demonstrate that each of these arguments raises only issues of state law and that each of these arguments is devoid of merit.

A.

The Court of Appeals' opinion does not recognize any new privileges. The privilege to comment upon matters which already are in the public domain is well recognized under the common law of Colorado, and does not depend for its existence upon the First Amendment. Petitioner's suggestion (Pet. 8) that *Gertz* and the *Restatement (Second) of Torts*, § 566 (1976) have "expand[ed] the 'fair comment' privilege to protect defamatory statements of opinion based upon facts known or mutually assumed by the parties to a communication" is simply erroneous. At common law, an opinion is protected when it is based upon facts which—even if not stated by the speaker—are "available to the recipient as a member of the public." *Restatement of Torts*, § 606 (1938). *See* Hill, *Defamation and Privacy Under The First Amendment*, 76 Colum. L. Rev. 1205, 1231 (1976):

> "Even when the appellation is not accompanied by a statement of supporting fact, it may be understood as based upon a core fact that is public or available to the public, as in the case of the record of a holder of government office."

This contextual approach to determining the meaning and privileged character of published words was embraced by this Court in *Greenbelt Cooperative Publishing Assn., Inc.* v. *Bresler*, 398 U.S. 6 (1970). State courts have adopted the same principle. See, *Hawkins* v. *Oden*, 459 A.2d 481 (R.I. 1983); *Pease* v. *Telegraph Publishing Co., Inc.*, 125 N.H. 62, 426 A.2d 463 (1981); *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 403 N.E.2d 376 (1980).

The facts underlying the controversies referred to in defendants' editorials were the subject of contemporaneous, truthful, and balanced news reporting in the community. Defendants' expressions of opinion were made with obvious reference to pending public controversies, the facts of which were in the public domain. As the Court of Appeals recognized, petitioner's conduct as a public official in general, and in relation to the particular controversies discussed, was fully open to public view. Members of the public thus had the means—either in person or through media reporting of the facts—to draw their own conclusions as to whether defendants' characterizations of plaintiff's conduct were reasonable.

Plaintiff siezes upon the language in the *Restatement (Second) of Torts*, § 566, which provides that an opinion based on unstated facts is privileged where the facts are "assumed to be true by both parties to the communication." *Id.* comment c. Petitioner would take this language, which obviously assumes a two-party conversation, and apply it out of context to a communication aimed at the general public. He would thus require anyone who wishes to enter into a debate on a public issue to precede his opinion with an elaborate recitation of supporting facts, or be able to prove that previously published facts concerning the matter had been read by each person who received his communication. Such a stringent standard of proof never has been required under the common law, which requires only that the facts be "available" to recipients of the communication. It would also be inconsistent with our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964); see also *Bose Corp.* v. *Consumers Union of United States, Inc.*, ____ U.S. ____, No. 82-1246 (April 30, 1984), slip op. 24-25, 27. Thus, the Court of Appeals was not required to adopt plaintiff's strained and unprecedented interpretation of Colorado common law.

B.

Plaintiff urges (Pet. 11) that the Court of Appeals improperly held that imputations of defamatory fact made during an election contest are entitled to an "absolute" privilege. To the contrary, however, the Court of Appeals simply adhered to the contextual approach—approved by the Colorado Supreme Court in *Burns* v. *McGraw-Hill Broadcasting Co., Inc.*, 659 P.2d 1351 (Colo. 1983)—which traditionally is used to determine what meaning a jury might reasonably attach to an allegedly defamatory publication (Pet. App. 14a-15a). In *Burns*, the Colorado Supreme Court affirmed a jury verdict for the wife and children of a policeman disabled in the line of duty, who had been libeled by a television documentary which reported the policeman's predicament and stated that he had been "deserted" by his wife and family. The defendant urged that the statement was mere opinion. In ruling upon the legal sufficiency of that defense, the *Burns* court emphasized that the "surrounding circumstances and factual context of any defamation action will determine whether a fact or an opinion has been published." 659 P.2d at 1359. The Court held the statement there involved to be actionable in context because it was "not supported by disclosed facts or circumstances which would allow an average listener to evaluate the purported opinion," and thus could be found by the jury to be a false and defamatory assertion of fact. 659 P.2d at 1360.

In applying *Burns*, the Court of Appeals in this case simply recognized the significant contextual difference between gratuitous comments concerning the merits of a private matrimonial dispute, made without indicating the factual basis therefor, and comments made during a heated political debate on issues which already had received extensive publicity and as to which the facts already were before the public. This contextual analysis raises no novel questions. The Court of Appeals' approach to the issue at hand has long been recognized by this

Court as a constitutional matter, *Greenbelt Cooperative Publishing Assn.* v. *Bresler,* 398 U.S. 6 (1970), and by other courts applying state common law. *Restatement of Torts* § 614, comment c; *Meyers* v. *Boston Magazine Co., Inc.,* 380 Mass. 336, 403 N.E.2d 376 (1980); *Yorty* v. *Chandler,* 13 Cal. App. 3d 467, 91 Cal. Rptr. 709 (1970).

C.

Plaintiff's third and final attack upon the Colorado Court of Appeals' application of the opinion privilege focuses upon satirical writings published in the opinion column of defendant Ed Quillen in a style which he frequently utilized. In these columns, Quillen employed the satirical devices of fictitious letters and dialogues, akin to those made popular by columnists such as Art Buchwald and Mike Royko. As plaintiff's expert on journalism correctly noted (Pet. 12), these pieces were not labeled "fiction" (Pet. App. 60a). However, they involved such clearly fictitious characters and absurd exchanges of dialogue that no reasonable person, giving them reasonable reflection, could possibly understand them literally or factually.

Plaintiff alleged that the "Supreme Commander Letter" was understood as a real letter, and that he was falsely depicted as an anti-democratic militarist. He also alleged that the Ziegler columns were understood as depicting a real person actually hired by plaintiff, for his own benefit, which would amount to a misuse of county funds. The Court of Appeals concluded, as a matter of Colorado law, that the publications were not reasonably capable of being so understood. Again, using the contextual analysis of *Burns* and similar cases, the Court examined the columns and the surrounding circumstances and concluded that it would be grossly unreasonable for any reader to construe them as asserting a defamatory fact.[10]

[10] The satirical and fictitious "context" of these publications is indeed "obvious," as found by the trial court (Pet. App. 7a). The speakers made a wide variety of ridiculous assertions such as Ziegler's statement that he was a

(footnote continued)

This determination was in keeping with the traditional role of a court under the common law, which must make a threshold legal determination whether a publication is reasonably capable of bearing the meaning which the plaintiff attributes to it. *Restatements (Second) of Torts* § 566, comment c at 173 (1977); *Restatement (Second) of Torts* § 614, comment c at 312 (1977); *Meyers* v. *Boston Magazine Co., Inc.*, 403 N.E.2d at 378-379.

Plaintiff offered affidavits of several persons who said that they did not perceive the satirical import of these columns at first reading. However, those affiants also stated that through conversations with other citizens in the community, they soon realized that the depiction was a "put on." Indeed, plaintiff admitted that there was no one in the county who did not know the fictional nature of this and the other satirical columns as of the time of his deposition in February 1980 (R. Part II, 275-276), a deposition which was taken one month prior to the recall election. The fact that a few people initially reacted to the publications in a clearly unreasonable manner has no bearing upon the trial court's threshold legal determination as to the manner in which the publications reasonably could be understood—a determination which always has been authorized by the common law of libel.

This case presents no occasion for this Court to consider the contours of the constitutional privilege which plaintiff says "sprang from the ear of *Gertz* v. *Robert Welch, Inc.*" (Pet. 13). Each of plaintiff's objections to the ruling of the Colorado Court of Appeals on the opinion issue involves legal principles established under the common law prior and without regard to this Court's decisions under the First Amendment.

(footnote continues)

"body count" inflator during the Vietnam war (Pet. App. 17a, 32a-33a). The depictions are, in the words of the certiorari petition, "moronic and absurd" (Pet. 2). The lower courts were within their province when they concluded that, as a matter of state law, these fantastic colloquies were obviously imaginary satires.

Moreover, this case does not even arguably involve the "outer limits of the opinion privilege" (Pet. 13). It involves the very core. If publishers cannot ridicule public officials, believed to be incompetent and unresponsive, by writing articles which, on their face, are tongue-in-cheek satires, then the scope of the opinion and fair comment privilege would be reduced to nothing. In a democratic society, it is the very purpose of the press to criticize public officials who do not perform their duty. Politicians dissatisfied with their performance at the ballot box have no right to receive a rich harvest of damages from editorial writers who have successfully highlighted their official failings.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Appendix

Article II, Section 10 of the Constitution of the State of Colorado provides as follows:

> "*Freedom of speech and press.* No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."